Court File No. CV-16-11582-00CL

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 PERFORMANCE SPORTS GROUP LTD., BAUER HOCKEY CORP., BAUER HOCKEY RETAIL CORP., BAUER PERFORMANCE SPORTS UNIFORMS CORP., BPS CANADA INTERMEDIATE CORP., BPS DIAMOND SPORTS CORP., EASTON BASEBALL/SOFTBALL CORP., KBAU HOLDINGS CANADA, INC., PERFORMANCE LACROSSE GROUP CORP., PSG INNOVATION CORP., BAUER HOCKEY RETAIL INC., BAUER HOCKEY, INC., BAUER PERFORMANCE SPORTS UNIFORMS INC., BPS DIAMOND SPORTS INC., BPS US HOLDINGS INC., EASTON BASEBALL/SOFTBALL INC., PERFORMANCE LACROSSE GROUP INC., PSG INNOVATION INC.

(Applicants)

FACTUM OF THE APPLICANTS
(Returnable November 30, 2016)

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TO: THE SERVICE LIST

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PART I - OVERVIEW

1. When the CCAA was amended to recognize the reality that going concern sales were and should be taking place under its auspices, Parliament decided not only to incorporate the existing substantive principles embodied in the developed law but also, it is respectfully submitted, to learn from and avoid expensive lessons from past experiences including in cross border cases.

2. For the sale situation, section 36 of the CCAA developed the learning from the establishing sale jurisprudence exemplified by *Royal Bank of Canada v. Soundair Corp.* including a market canvas sufficient to identify potentially willing and able buyers, access to data to make them informed and sufficient time to remove the possibility of compulsion so that the classic definition of fair market value is met as nearly as it can be in insolvent circumstances.[1] The Applicants have planned a process to satisfy these conditions.

[1] *Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R. (3d) 1, Applicants Book of Authorities ("**Applicants' BOA**"), Tab 1.

3. The CCAA also recognized the reality that there would be both a variety of interests reflected in the priority waterfall and the potential for allegations and disputes as to the past – in essence that there are often claims raised that wrongs occurred involving management, the board and others. That these allegations are relatively easy to make and are expected from stakeholders disappointed in their investment is balanced by the idea that legitimate disputes are preserved where possible and the priority of these claims maintained, with equity claims expressly ranking lowest under section 22.1 of the CCAA. The basic structure of the CCAA addresses the prospect of such discontent by the involvement of the Monitor. In the pre-filing stage and throughout, the Monitor, as an independent person, provides assurance to the supervising Court as to the good faith of the Applicants.

4. What the CCAA structure is also designed to prevent is issues or disputes as to the past bogging down the sales process to the prejudice of the whole "economic community" of stakeholders including employees, suppliers and customers. The stalking horse bid and the bidding process were developed by the Applicants with financial advisors and other professionals to preserve the enterprise as a going concern which is the optimal result for that community. It is also designed to provide a reasonable opportunity for a better bid if there is one to be found. The Applicants plan to provide an update regarding the status of those efforts just prior to the motion so that the Court will have current information.

5. Equally, the reasonable judgments of the persons negotiating in the difficult situation of approaching insolvency are not second guessed, on the basis of subsequent Monday morning quarterbacking assertions that a better deal for the particular interest represented was available or ought to have been negotiated. The Applicants can and will address all such criticisms but this basic principle is to be borne in mind and again the review by the Monitor is important in this regard.

6. In a nutshell, the Applicants seek Court approval to continue the process that is underway and ancillary relief and orders necessary to give effect to it. As the Applicants detail herein, they meet not only the detailed technical requirements of the CCAA but also, and more importantly, the substance of what it intends to accomplish.

PART II - THE FACTS

7. The facts with respect to this motion are more fully set out in the affidavit of Mark Vendetti sworn October 31, 2016 (the "**Vendetti Affidavit**") and the affidavits of Brian J. Fox sworn November 13, 2016 (the "**First Fox Affidavit**") and November 21, 2016 (the "**Second Fox Affidavit**").

A. Background to the Restructuring Proceedings

8. On October 31, 2016, Performance Sports Group Ltd. ("**PSG**") and the other applicants listed above (collectively, the "**Applicants**" or the "**PSG Entities**") were granted protection under the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36 (as amended, the "**CCAA**"). Ernst & Young Inc. was appointed as monitor of the Applicants (the "**Monitor**") in the CCAA proceedings (the "**CCAA Proceedings**"). On the same date, the Applicants filed a voluntary petition in the United States Bankruptcy Court for the District of Delaware (the "**U.S. Court**") under Chapter 11 of Title 11 of the U.S. Code (the "**Chapter 11 Proceedings**" and together with the CCAA Proceedings, the "**Restructuring Proceedings**").

> First Fox Affidavit at para. 3, Applicants' Motion Record, Tab 2.
> Second Fox Affidavit at para. 3, Applicants' Supplementary Motion Record, Tab 1.

9. The PSG Entities are industry leading designers, developers and manufacturers of hockey, baseball/softball, and lacrosse equipment and apparel, operating under a number of recognizable brands including BAUER (hockey) and EASTON (baseball/softball).

> Vendetti Affidavit at paras. 17 and 23, Applicants' Motion Record, Tab 2(D).

10. Over the past eighteen months, the PSG Entities experienced an ongoing liquidity crisis and an eventual event of default under the Applicants' secured credit facilities, which ultimately triggered the commencement of the Restructuring Proceedings.

> First Fox Affidavit at paras. 9-10, Applicants' Motion Record, Tab 2.

11. Since commencing the Restructuring Proceedings, the Applicants have continued to operate their business in the ordinary course and are working diligently to advance restructuring initiatives.

> First Fox Affidavit at paras. 3 and 46-47, Applicants' Motion Record, Tab 2. Second Fox Affidavit at para. 3, Applicants' Supplementary Motion Record, Tab 1.

B. The Applicants' Significant Efforts to Develop Interim Financing and a Sales Process in the Face of Insolvency Proceedings

12. In the short period leading up to the commencement of the Restructuring Proceedings, which was dictated by the time between the Applicants' breach under their secured lending documents and the period of time their secured lenders were prepared to extend, the Applicants engaged in a broad review of their strategic alternatives to develop a going-concern solution for their business and stakeholders. Assisting the Applicants and the special committee of PSG's board of directors were the Applicants' and the special committee's legal and financial advisors, including Centerview Partners LLC ("**Centerview**"), a well-established investment banker.

> First Fox Affidavit at paras. 9-11, Applicants' Motion Record, Tab 2.

13. With the assistance of their advisors, the Applicants developed a sale plan and an interim financing plan. The Applicants primarily engaged with PSG's pre-filing term loan credit facility lenders (the "**Term Lenders**") and Sagard, a shareholder of PSG, both of which had reached out to the Applicants with an interest in developing a transaction. Based on external timing constraints, the Applicants chose more intensive engagement with fewer, but demonstrably interested, parties over casting a broader net.

> First Fox Affidavit at paras. 12-14, Applicants' Motion Record, Tab 2.

14. The PSG Entities negotiated with the Term Lenders and Sagard, receiving DIP financing and stalking horse asset purchase proposals from both parties. After consideration

of the available alternatives, the PSG Entities, with the assistance of their advisors, determined in their business judgment that the optional value-maximizing path forward for their stakeholders was to enter into the Stalking Horse Agreement and the term loan DIP credit agreement (the "**Term Loan DIP Agreement**") with the Stalking Horse Purchaser, and to commence the Restructuring Proceedings.

> First Fox Affidavit at paras. 15-16, Applicants' Motion Record, Tab 2.

15. To finance these proceedings, the Applicants entered into a term loan DIP credit agreement (the "**Term Loan DIP Agreement**") with the Stalking Horse Purchaser for a credit facility (the "**Term Loan DIP Facility**") in the amount of approximately $361.3 million. The DIP Financing allowed the PSG Entities to keep operating in the ordinary course and will allow them to carry out the proposed Bidding Procedures to fully canvass the market and determine if the Stalking Horse Agreement continues to be the transaction offering the best value for the PSG Entities' stakeholders. This Court approved the Term Loan DIP Credit Agreement at the initial application but the charge was not sought at that time.

> Second Fox Affidavit at paras. 23-25, Applicants' Motion Record, Tab 2.

16. As part of the strategic review and in parallel with the development of the Stalking Horse Agreement, the Applicants developed what they believed to be the optimal strategy to market the assets of the business through the Bidding Procedures.

> First Fox Affidavit at paras. 18, 30, 32-33 and 44, Applicants' Motion Record, Tab 2.

C. The Stalking Horse Agreement

17. The Stalking Horse Agreement offers significant value for the PSG Entities' stakeholders as an excellent starting point for the sales process contemplated by the Bidding Procedures.

> First Fox Affidavit at paras. 11-12, 16 and 19, Applicants' Motion Record, Tab 2.

18. Under the Stalking Horse Agreement, the Stalking Horse Purchaser will pay a cash purchase price of $575 million, subject to certain adjustments, assumes a significant portion of the Applicants' liabilities, including, *inter alia*, most of the trade obligations of the PSG Entities and liabilities arising under the Applicants' collective labour agreements relating to the Mississauga, Ontario and Blainville, Quebec operations, including the simplified defined contribution pension plan for the unionized employees in Blainville. The Stalking Horse Agreement ascribes significant value to the PSG Entities' business. The Base Purchase Price represents a 20.6x multiple of PSG's annualized adjusted EBITDA for the nine-months ending February 28, 2016, well above PSG's historical average trading multiple.

First Fox Affidavit at para. 19, Applicants' Motion Record, Tab 2.

19. The Acquired Assets under the Stalking Horse Agreement constitute substantially all of the properties, rights, interests and other assets of PSG Entities, allowing the business to continue as a going-concern under new ownership after Closing, for the benefit of the Applicants' stakeholders, including their employees, customers and suppliers.

First Fox Affidavit at para. 21, Applicants' Motion Record, Tab 2.

D. The Bidding Procedures

20. The Applicants believe that the Bidding Procedures negotiated with the Stalking Horse Purchaser, provide a fair and efficient process to canvass the market for higher or better offers compared to the Stalking Horse Agreement.

First Fox Affidavit at para. 30, Applicants' Motion Record, Tab 2.

21. The Bidding Procedures contemplate a 71-day sales process, from the commencement of the Restructuring Proceedings to the date of the Auction. During this time, the interested parties will be able to conduct and complete due diligence and develop bids potentially superior to the Stalking Horse Agreement.

First Fox Affidavit at para. 34, Applicants' Motion Record, Tab 2.

22. The key dates under the Bidding Procedures are as follows:

   (a) **<u>January 4, 2017 at 5:00 p.m. EDT</u>**: Bid Deadline - due date for Bidders to submit a Qualified Bid and Good Faith Deposit;

   (b) **<u>January 9, 2017 at 10:00 a.m. EDT</u>**: Auction - held at the offices of U.S. Counsel for the PSG Entities; and

   (c) **<u>January 11, 2017 at 10:00 a.m. EDT</u>**: Sale Hearing - conducted in the U.S. and Canada, jointly, concurrently or as otherwise determined by the Courts.

First Fox Affidavit at para. 31, Applicants' Motion Record, Tab 2.

23. In order to ensure that interested parties had as much time as possible to evaluate the opportunity presented in the Bidding Procedures, Centerview, together with the PSG Entities, prepared a fully populated data-room, a confidential information memorandum containing significant information regarding the PSG Entities' various businesses, and a form of non-disclosure agreement for interested parties. The sales process commenced immediately upon filing for creditor protection and allowed potential bidders to begin due diligence without delay.

First Fox Affidavit at para. 36, Applicants' Motion Record, Tab 2.

24. As of November 11, 2016, Centerview had contacted 105 potentially interested parties, including 23 strategic parties and 82 financial parties. A number of parties have executed confidentiality agreements and commenced diligence on the Applicants' business, and a number of others have expressed an interest in participating in the sales process. These numbers will be updated prior to the return of the motion.

First Fox Affidavit at para. 37, Applicants' Motion Record, Tab 2.

PART III - ISSUES

25. The issues on this motion are as follows (each capitalized term as defined below):

   (a) with respect to the Stalking Horse and Bidding Procedures Order, whether to:

(i) approve the Stalking Horse Agreement;

(ii) approve the Bidding Procedures; and

(b) with respect to the Amended and Restated Initial Order, whether to:

(i) approve the Cross-Border Protocol;

(ii) approve the PSG Entities' engagement of Centerview;

(iii) authorize payment of certain severance obligations;

(iv) grant the Term Loan DIP Charge and approve the Refinancing; and

(v) grant super-priority to the Administration Charge, the Directors' Charge, the ABL DIP Charge, the Intercompany Charge (as each is defined in the Initial Order) and the Term Loan DIP Charge (the "**Charges**").

(c) whether to extend the Stay Period to February 28, 2017.

PART IV - THE LAW

A. The Stalking Horse Agreement Should be Approved

26. The remedial nature of the CCAA confers broad powers to facilitate restructuring, including the power to approve a sale process in relation to a CCAA debtor's business and assets, prior to or in the absence of a plan of compromise and arrangement.

> *Nortel Networks Corp (Re)*, [2009] O.J. No. 3169 (S.C.J. [Commercial List]) at paras. 30 and 48 ["***Nortel***"], Applicants' BOA, Tab 2.
>
> CCAA, sections 11 and 36.

27. Stalking horse agreements are commonly used in insolvency proceedings to facilitate sales of businesses and are intended to establish a baseline price and deal structure for any superior bids from interested parties. The use of a stalking horse agreement in a sales process assists in maximizing the value of a business for the benefit of the debtor's stakeholders and can enhance the fairness of the sales process. Stalking horse agreements have been approved concurrently with a sales process under the CCAA and in other insolvency proceedings.

> *Danier Leather Inc., Re,* 2016 ONSC 1044 at para. 20 ["***Danier***"], Applicants' BOA, Tab 3.
>
> *CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd.,* 2012 ONSC 1750 [Commercial List] at para. 7 ["***CCM***"], Applicants' BOA, Tab 4.
>
> *Nortel* at para. 17, Applicants' BOA, Tab 2.
>
> *Re Tiger Brand Knitting Co.* (2005), 9 C.B.R. (5th) 315 (Ont. S.C.J.) at para. 10., Applicants' BOA, Tab 5.

28. In the case at bar, the Stalking Horse Agreement was evaluated and negotiated in the context of receiving a competing proposal from the Term Lenders and was assessed to be a superior offer. The Term Lenders' proposal was premised on a credit bid of a portion of their roughly $330 million secured debt. The Stalking Horse Agreement offers a base purchase price higher than any possible credit bid as it exceeds the value of the secured debt. The Term Lenders' proposal also contemplated more expensive financing, tighter sales process milestones and was tied to a DIP financing proposal that could have prevented the PSG Entities' executing a superior alternative offer. The PSG Entities believe, in their business judgement, that the Stalking Horse Agreement will maximize value for their stakeholders.

> First Fox Affidavit at paras. 13-14, Applicants' Motion Record, Tab 2.

29. The Stalking Horse Agreement sets the minimum acceptable bid in the Bidding Procedures, which are designed to achieve the highest or otherwise best offer for the PSG Entities' business and assets. The Stalking Horse Agreement ascribes significant value to the PSG Entities' business and if consummated it would result in a significant benefit to the Applicants' stakeholders, including by the continued operation of the PSG Entities' business as a going concern.

> First Fox Affidavit at paras. 18-19 and 29, Applicants' Motion Record, Tab 2.

30. The Stalking Horse Agreement provides certainty to the market that the PSG Entities have the necessary stability to continue operating; maintaining the associated positive

relationships with the Applicants' stakeholders during the Restructuring Proceedings is critical to the business and restructuring plan.

> First Fox Affidavit at para. 16, Applicants' Motion Record, Tab 2.

31. The Stalking Horse Agreement provides for certain bid protections for the Stalking Horse Purchaser, consisting of an Expense Reimbursement payment of $3.5 million and a Break-Up Fee representing 3.5% of the Base Purchase Price (collectively, the "**Bid Protections**"). Break fees and expense reimbursement payments have been approved by the Courts as part of stalking horse agreements. Such fees are necessary for attracting stalking horse purchasers to compensate for the time, resources and risk taken in developing a stalking horse agreement. Such fees and payments also represent the price of stability, and thus some premium over simply providing for out of pocket expenses may be expected. Courts recognize that break fees and expense reimbursement payments vary depending on the case, but may justifiably reach up to 5% of the expected transaction value.

> First Fox Affidavit at para. 25, Applicants' Motion Record, Tab 2.
>
> *Danier* at para. 41, Applicants' BOA, Tab 3.
>
> *CCM* at para. 13, Applicants' BOA, Tab 4.

32. It has also been recognized that where bid protections have been carefully considered a Court does not substitute its own judgment for the judgment of the debtor and its advisors. Agreeing to bid protections is a matter of business judgement and deference to the business decisions of the debtor is appropriate if the decisions are within a range of reasonableness.

> *Brainhunter Inc. (Re)*, 2009 CarswellOnt 8207 (S.C.J. [Commercial List]) at para. 20 ["***Brainhunter***"], Applicants' BOA, Tab 6.

40. In this instance, the Bid Protections represent approximately 4% of the Base Purchase Price of US$575 million, not taking into account the value provided by the assumption of the Assumed Liabilities. The Bid Protections were the subject of extensive and intensive arm's length negotiations and the PSG Entities believe in their business judgement that they are reasonable in light of the significant value provided by the Stalking Horse Agreement. The

Bid Protection contemplated by the Stalking Horse Agreement were a necessary component for the Stalking Horse Purchaser to agree to the Stalking Horse Agreement, which as noted above, will be beneficial in maximizing value for the PSG Entities' stakeholders during the Restructuring Proceedings.

> First Fox Affidavit at paras. 13 - 14, Applicants' Motion Record, Tab 2.

41. In developing the sales process, including the Stalking Horse Agreement, Bid Procedures and Term Loan DIP Agreement, the directors of the Applicants acted in accordance with their fiduciary duties, which are set out in s. 142(1) of the *Business Corporations Act* (British Columbia):

> "A director or officer of a company, when exercising the powers and performing the functions of a director or officer of the company, as the case may be, must...act honestly and in good faith with a view to the best interests of the company..."
>
> *Business Corporations Act*, S.B.C. 2002, c. 57, section 142(1).

42. The Supreme Court of Canada (the "**SCC**") has clarified the scope of this duty in two recent cases dealing with similar language in the Canada Business Corporations Act: *Peoples Department Stores Inc. (Trustee of) v. Wise,* and *BCE Inc. v. 1976 Debentureholders*.

> *Peoples Department Stores Inc. (Trustee of) v. Wise,* [2004] 3 S.C.R. 461 ["***Peoples***"], Applicants' BOA, Tab 7.
>
> *BCE Inc. v. 1976 Debentureholders,* [2008] 3 S.C.R. 560 ["***BCE***"], Applicants' BOA, Tab 8.

43. A central question in BCE was whether the scope of the directors' fiduciary duty was limited to maximizing shareholder value, as established in the "*Revlon* line" of cases from Delaware, or whether the duty was to the corporation as a whole. The SCC held that the directors owe fiduciary duties to the corporation only and not to any particular stakeholder. As stated by the Court:

> [I]t is often the case that the interests of shareholders and stakeholders are co-extensive with the interests of the corporation. But if they conflict, the directors' duty is clear – it is to the corporation."
>
> *BCE* at para. 37, Applicants BOA, Tab 8.

44. The SCC has also noted that the content of the fiduciary duty varies with the situation at hand. However, the courts will give deference to the business judgment of directors (citations omitted):

> "In considering what is in the best interests of the corporation, directors may look to the interests of, *inter alia*, shareholders, employees, creditors, consumers, governments and the environment to inform their decisions. Courts should give appropriate deference to the business judgment of directors who take into account these ancillary interests, as reflected by the business judgment rule. The "business judgment rule" accords deference to a business decision, so long as it lies within a range of reasonable alternatives. It reflects the reality that directors, who are mandated under s. 102(1) of the CBCA to manage the corporation's business and affairs, are often better suited to determine what is in the best interests of the corporation. This applies to decisions on stakeholders' interests, as much as other directorial decisions."
>
> *BCE* at paras. 38 and 40, Applicants BOA, Tab 8.

45. CCAA courts have cited *Peoples* and *BCE* in analysing whether directors have met their fiduciary duties.

> See e.g., *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6 at paras. 194, Applicants BOA, Tab 9; *Unique Broadband Systems Inc. (Re)*, 2014 ONCA 538 at paras. 45-46, Applicants' BOA, Tab 10.

46. On the facts available to them, the directors used their reasonable judgment during a highly uncertain, fast-moving period to determine the best interest of the corporation and act accordingly. Their judgment should not be second guessed.

B. The Bidding Procedures Should Be Approved

33. In *Nortel*, the Court identified several factors to consider in determining whether to approve a sales process:

(a) Is a sale warranted at this time?

(b) Will the sale be of benefit to the whole "economic community"?

(c) Do any of the debtors' creditors have a *bona fide* reason to object to a sale of the business?

(d) Is there a better viable alternative?

> *Nortel* at para. 49, Applicants' BOA, Tab 2.

34. The Nortel criteria have since been consistently applied.

> *Danier* at para. 23, Applicants' BOA, Tab 3.
>
> *U.S. Steel Canada Inc. (Re)*, 2015 ONSC 2523 [*"U.S. Steel"*] [Commercial List] at para 3, Applicants' BOA, Tab 11.
>
> *Mustang GP Ltd. (Re)*, 2015 ONSC 6562 at paras. 37-38, Applicants' BOA, Tab 12.
>
> *Brainhunter* at para. 13, Applicants' BOA, Tab 6.

35. In *U.S. Steel* it was noted that, while not technically applicable at the process approval stage of a proceeding, the factors set out in s. 36(3) of the CCAA may be considered. Section 36(3) of the CCAA provides:

> In deciding whether to grant the authorization, the court is to consider, among other things,
>
> (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
>
> (b) whether the monitor approved the process leading to the proposed sale or disposition;
>
> (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

U.S. Steel at para. 3, Applicants' BOA, Tab 11.

CCAA, s. 36(3).

36. In these circumstances, the Bidding Procedures provide an appropriate framework for the sales process to obtain the best offer for PSG Entities' assets and business, maximizing value for stakeholders. Considering the *Nortel* Criteria and applicable factors set out in s. 36(3) of the CCAA, the Bidding Procedures should be approved as:

(a) **A sale transaction is warranted at this time:** negative events over the course of 18 months precipitated the PSG Entities' current liquidity crisis. The liquidity crisis caused the PSG Entities to consider strategic alternatives and precipitated a need to restructure and preserve their business. A sale will allow the PSG Entities' business to continue as a going-concern and emerge from creditor protection in a timely fashion which will preserve value for all stakeholders.

(b) **A sale will benefit the whole economic community**: As noted, a sale will allow the PSG Entities to continue as a going concern, benefitting suppliers, employees and customers. Further, the Stalking Horse Agreement, which sets the floor for other sale transactions, is expected to result in the PSG Entities' secured creditors being repaid in full and the PSG Entities' other creditors receiving meaningful distributions. The value that results from any sale transaction will benefit stakeholders generally.

(c) **No creditor has objected to the Bidding Procedures and creditors will be consulted during the process:** The Applicants will address objections in details to the Bidding Procedures separately once all are received.

(d) **There was no superior alternative:** As described throughout, the PSG Entities determined after careful and extensive consideration that the Stalking

Horse Agreement and Bidding Procedures was the best solution for the PSG Entities. The Bidding Procedures, with the stability provided by the Stalking Horse Agreement, represented the best option in the circumstances.

First Fox Affidavit at paras. 9, 11, 16, 18, 29, 35, 38-40, 49, Applicants' Motion Record, Tab 2.

37. The insider bid regulations of MI 61-101 provide an exemption from securities approval where a CCAA debtor is undertaking a CCAA s. 36 asset sale. The Applicants intend to seek an order of this Court exempting any requirements to comply with MI 61-101 on this basis.

C. The Term Loan DIP Charge Should be Granted and the Refinancing Should be Approved

a. The Term Loan DIP Charge Should be Granted

38. The PSG Entities seek a charge securing all obligations arising under the Term Loan DIP Agreement (the "**Term Loan DIP Charge**").[2] This Court approved the Term Loan DIP Credit Agreement as part of the relief granted in the Initial Order. At the time, the PSG Entities did not seek a charge securing the amounts owing thereunder. It is a condition of the Term Loan DIP Facility that a super-priority Term Loan DIP Charge be granted.

Second Fox Affidavit at paras. 23-25, Applicants' Supplementary Motion Record, Tab 1.

39. Section 11.2 of the CCAA provides jurisdiction to approve the DIP Facility and to grant the DIP Charge. In relevant part, these sections provide:

Interim financing

11.2(1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an

[2] Additional details regarding the Term Loan DIP Agreement are set out in the affidavit of Mark Vendetti sworn October 31, 2016 in support of the Initial Order (the "**Vendetti Affidavit**"), attached as Exhibit A to the Second Fox Affidavit. Capitalized terms used in this section but not defined are as defined in the Vendetti Affidavit.

> amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.
>
> **Priority - secured creditors**
>
> 11.2(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
>
> **Factors to be considered**
>
> (4) In deciding whether to make an order, the court is to consider, among other things,
>
> > (a) the period during which the company is expected to be subject to proceedings under this Act;
> >
> > (b) how the company's business and financial affairs are to be managed during the proceedings;
> >
> > (c) whether the company's management has the confidence of its major creditors;
> >
> > (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
> >
> > (e) the nature and value of the company's property;
> >
> > (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
> >
> > (g) the monitor's report referred to in paragraph 23(1)(b), if any.
>
> CCAA, section 11.2(1) to 11.2(2) and 11.2(4).

40. The Term Loan DIP Facility is provided on terms that are fair and reasonable and the product of significant arms-length negotiation and compromise, and has been approved by this Court. The criteria from section 11.2(1) and 11.2(4) support granting the Term Loan DIP Charge on the terms sought in the Amended and Restated Initial Order:

(a) the PSG Entities' borrowing base is not sufficient to support finding the entirety of these proceedings out of the PSG Entities' ABL DIP Facility (as that term is defined in the Vendetti Affidavit). The PSG Entities require a supplemental source of liquidity, which the Term Loan DIP Facility provides;

(b) the ability to borrow funds under the Term Loan DIP Facility is crucial to retaining the confidence of the PSG Entities' stakeholders by clearly evidencing it has the means to continue to satisfy its obligations in the ordinary course, conveying a clear message regarding the stability of operations for the pendency of these proceedings;

(c) the management of the PSG Entities' business throughout the CCAA process will be overseen by the Monitor, who will supervise spending under the Term Loan DIP Facility; and

(d) the position of the Monitor will be addressed once its report is filed.

> Vendetti Affidavit at paras. 210-213 and 221-226, Applicants' Motion Record, Tab 2(D).

41. In *Canwest Global*, Justice Pepall addressed the criteria set out in s. 11.2(1), namely:

(a) whether notice has been given to secured creditors likely to be affected by the security or charge;

(b) whether the amount to be granted under the DIP Facility is appropriate and required having regard to the debtors' cash-flow statement; and

(c) whether the DIP Lender's Charge secures an obligation that existed before the Order was made.

> *Canwest Global Communications Corp. (Re)*, 2009 CarswellOnt 6184 (S.C.J. [Comm. List]) [***"Canwest Global"***] at paras. 32-34, Applicants' BOA, Tab 13.

42. The PSG Entities have given notice to all secured creditors that are likely to be affected by the Term Loan DIP Charge. As discussed in the initial application materials, the credit facilities available under the Term Loan DIP Agreement are specifically tailored to meet the PSG Entities' operating costs, with a view to the ensuring uninterrupted business throughout the sales process. Finally, the Term Loan DIP Charge will not secure any pre-existing obligation. The Stalking Horse Purchaser has no pre-existing creditor relationship with the PSG Entities. Any draw on the credit facilities available under the Term Loan DIP Agreement will be made after the return of this motion and subject to the terms of the Amended and Restated Initial Order.

> Second Fox Affidavit at paras. 32 and 35, Applicants' Supplementary Motion Record, Tab 1. See also Vendetti Affidavit at paras. 210-213 and 221-226, Applicants' Motion Record, Tab 2(D).

43. Without access to the delayed drawn term loan facility, the PSG Entities will not have adequate financing to continue operating as a going concern and will not be able to complete their contemplated sales process, to their stakeholders' detriment. The Term Loan DIP Charge is an essential precondition to the Term Loan DIP Agreement, which is itself a vital part of the PSG Entities' restructuring strategy. In the circumstances, the Term Loan DIP Charge should be approved on the terms sought herein.

> Second Fox Affidavit at para. 32, Applicants' Supplementary Motion Record, Tab 1.

b. The Refinancing Should be Approved

44. The PSG Entities are also seeking approval of the Refinancing, being the payment in full of the obligations owed to PSG's pre-filing term lenders, and authorization to pay the fees and expenses of their professional advisors.

> Second Fox Affidavit at para. 28, Applicants' Supplementary Motion Record, Tab 1.

45. The Refinancing is a requirement under the terms of the Term Loan DIP Agreement, which agreement is necessary to provide the Applicants with sufficient liquidity to complete their insolvency proceedings. Further, the Applicants cannot borrow under the Term Loan DIP Agreement until the Refinancing has been completed.

> Second Fox Affidavit at para. 30, Applicants' Supplementary Motion Record, Tab 1.

46. There is no prejudice to other creditors of the Applicants, as: (i) the Term Loan DIP Facility replaces the pre-filing term lenders' existing security; and (ii) the sale proceeds from the Stalking Horse Purchaser's bid (or a superior bid) are expected suffice to pay out the term loan in full.

> Second Fox Affidavit at para. 31, Applicants' Supplementary Motion Record, Tab 1.

47. Given that the requirements of section 11.2(1) are otherwise satisfied with respect to the Term Loan DIP Charge, and taking into account the fact that such interim financing is vital to the PSG Entities continued operation and conduct of the sales process, circumstances exist that make granting the Term Loan DIP Charge on the terms contemplated in the Term Loan DIP Agreement appropriate. On these facts, granting the Term Loan DIP Charge and approving the Refinancing is appropriate and this relief should be granted.

D. The Cross-Border Protocol Should be Approved

48. To facilitate the orderly administration of these Restructuring Proceedings, the proposed Amended and Restated Initial Order approves the Cross-Border Protocol.

> Second Fox Affidavit at paras. 8-10, Applicants' Supplementary Motion Record, Tab 1.

49. Courts have approved cross-border protocols where "it is clear that there are issues of over-lapping jurisdiction that would make a form of cross border protocol appropriate." A cross-border protocol is particularly desirable if debtors' cross-border operations are highly integrated and ongoing coordination between the Canadian and U.S. courts is necessary to facilitate an upcoming sales process.

> *Calpine Canada Energy Limited (Companies' Creditors Arrangement Act)*, 2006 ABQB 743 at paras. 36 and 39 ["***Calpine***"], Applicants' BOA, Tab 14. See also *Northstar Aerospace, Inc.* (Re), 2012 ONSC 3974 at para. 24, Applicants' BOA, Tab 15. See generally, CCAA, section 11.

> *Barzel Industries Canada Inc., Re,* 2009 CarswellOnt 9132 at para. 18, Applicants' BOA, Tab 16.

50. There are a number of overlapping issues in these Restructuring Proceedings, including approval of the Bidding Procedures and Stalking Horse Agreement, approval of interim financing, and ultimately the approval of a sale of the Applicants' business and

assets. The PST Entities' business is highly integrated between the jurisdictions; as such, the success of any restructuring will necessarily involve cross-border cooperation.

> Vendetti Affidavit at paras. 17-18 and 23, Applicants' Motion Record, Tab 2(D).
>
> Second Fox Affidavit at paras. 7-11, Applicants' Supplementary Motion Record, Tab 1.

51. The Cross-Border Protocol is the product of negotiations between PSG and certain of its key stakeholders. The coordination contemplated by the Cross-Border Protocol is essential to the success of these proceedings and will reduce the costs of adjudicating these proceedings, and avoid duplication of effort and possible conflicting rulings of the Courts.

> Second Fox Affidavit at paras. 8-11, Applicants' Supplementary Motion Record, Tab 1.

52. In *Eddie Bauer*, Justice Morawetz stressed that such protocols promote efficiency, fairness and consistency in cross-border insolvencies. The Cross Border Protocol negotiated in the Restructuring Proceedings meets these goals by, *inter alia*, establishing principles for issues arising out of the cross-border nature of the Restructuring Proceedings and procedures for the Applicants and their stakeholders to file materials and conduct joint hearings. The Cross-Border Protocol is in the best interests of the Applicants and their stakeholders and should be approved.

> *Eddie Bauer of Canada, Inc. (Re)* (2009), 55 C.B.R. (5th) 33 (Ont. S.C.J. [Comm List]) at paras. 27-28, Applicants' BOA, Tab 17.
>
> Second Fox Affidavit at para. 12, Applicants' Supplementary Motion Record, Tab 1.

E. Centerview's Engagement Should be Approved and Centerview's Fees Should Form Part of the Administration Charge

a. Centerview's Fees are Reasonable and Should be Approved

53. The PSG Entities seek the approval of their engagement of Centerview and the fees and expenses in the CV Engagement Letter *nunc pro tunc* in order to ensure an efficient and effective sales process.

> Second Fox Affidavit at para. 12, Applicants' Supplementary Motion Record, Tab 1.

54. Courts have approved the engagement of financial advisors pursuant to section 11 of the CCAA. Section 11.52(1)(b) of the CCAA grants the jurisdiction to approve the fees and expenses of financial advisors and, in so doing, order a super-priority charge to secure them:

> 11.52 (1) ... [T]he 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...
>
> (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act...
>
> CCAA, section 11 and 11.52(1)(b).
>
> *Canwest Global Communications Corp. (Re)*, Toronto CV-09-8396-00CL (Ont. S.C.J. [Comm. List]), Initial Order (October 6, 2009) at para. 61, Applicants' BOA, Tab 18.
>
> *Target Canada Co. et al (Re)*, Toronto CV-15-10832-00CL (Ont. S.C.J. [Comm. List]), Initial Order (January 15, 2015) at para. 42, Applicants' Book of Authorities, Tab 19.
>
> *Canwest Publishing Inc. (Re)*, 2010 ONSC 222 at paras. 52 and 55 (S.C.J. [Comm. List]) ["*Canwest Publishing*"], Applicants' BOA, Tab 20.

55. Since being retained, Centerview has provided the applicants with wide-ranging corporate and investment banking advisory services. Through this engagement, Centerview has acquired a significant understanding of the Applicants' business and has been active in canvassing market interest as part of the sales process that is the subject of this motion.

Centerview's continued involvement is essential to the successful completion of the Restructuring Proceedings.

> Second Fox Affidavit at para. 13, Applicants' Supplementary Motion Record, Tab 1.

56. The loss of Centerview's information and expertise would be detrimental to the proposed sales process. Without continuity of Centerview's information and expertise, the Applicants would likely be unable to meet the conditions of their DIP Financing and the Stalking Horse Agreement that underpins the proposed sale process, all of which would in turn place the success of the Restructuring Proceedings at risk.

> Second Fox Affidavit at paras. 12-15, Applicants' Supplementary Motion Record, Tab 1.

57. The CV Engagement Letter provides for a monthly retainer fee as well as a sale fee based on the aggregate consideration paid as part of any sale of the Applicants' business. The sale fee is payable at the closing of a sale transaction (the Monthly Fee and the Sale Fee, respectively, as each capitalized term is defined and described in the Second Fox Affidavit and the CV Engagement Letter). The terms of the CV Engagement Letter were approved by PSG's board of directors prior to the commencement of these Restructuring Proceedings.

> Second Fox Affidavit at para. 16, Applicants' Supplementary Motion Record, Tab 1.

58. The quantum of fees is reasonable in light of the services Centerview has provided and will be providing the Applicants in connection with the sale process and during these Restructuring Proceedings. The CV Engagement Letter provides for a monthly retainer fee as well as a sale fee based on the aggregate consideration paid as part of any sale of the Applicants' business. The sale fee is payable only at the closing of such sale transaction. The terms of the CV Engagement Letter were approved by PSG's board of directors prior to the commencement of these Restructuring Proceedings.

> Second Fox Affidavit at paras. 12-16, Applicants' Supplementary Motion Record, Tab 1.

59. The fee structure in the CV Engagement Letter reflects an appropriate incentive to secure a desirable offer that maximizes returns for the Applicants' economic community of stakeholders. Given the magnitude and complexity of the proposed sales process, and the valuable insight Centerview has acquired in the course of its engagement, Court approval of the CV Engagement Letter and the fee structure set out therein is appropriate.

> *Canwest Publishing* at para. 55, Applicants' BOA, Tab 20.

b. Centerview's Fees Should Form Part of the Administration Charge

60. Courts grant super-priority charges securing the payment of fees and expenses of financial advisors for services rendered (or to be rendered) during CCAA proceedings in order to ensure their participation, provided the fees are fair and reasonable. In particular, it is within this Court's power to grant a super-priority charge to secure the payment of a sale fee contingent on the closing of a sale transaction in a CCAA proceeding.

> *Target Canada Co. (Re)*, 2015 ONSC 303 at paras. 73-75, , Applicants' BOA, Tab 21.
>
> *Canwest Publishing* at paras. 54-55, Applicants' BOA, Tab 20.
>
> *Essar Algoma Steel Inc. (Re)*, (29 January 2016), Toronto, Court File No. CV-15-000011169-00CL (S.C.J. [Comm. List]), Applicants' BOA, Tab 22.

61. In this case, the PSG Entities seek to secure the fees owing to Centerview by extending the Administration Charge over the fees rather than by creating a separate charge. The following factors from *Canwest Publishing* support securing those fees owing to Centerview by a super-priority charge:

(a) The PSG Entities' business is complex and the services of an experienced investment banking advisor are essential to conduct a successful sales process;

(b) Centerview's knowledge of and experience with the PSG Entities would be wasted if the PSG Entities were deprived of the benefit of Centerview's advice and assistance and were required to retain a new financial advisor;

(c) The fees were the product of arms-length negotiations and were approved by the PSG board of directors prior to the start of the Restructuring Proceedings;

(d) Centerview fulfills an important role in the Restructuring Proceedings that could not be replicated by the Applicants' other professional advisors; and

(e) Centerview's involvement is vital to completing the upcoming sales process in as expeditious and inexpensive a manner as possible.

Canwest Publishing at para. 54, Applicants' BOA, Tab 20.

Second Fox Affidavit at paras. 12-15, Applicants' Supplementary Motion Record, Tab 1.

62. Without Centerview's continued participation, the success of the Restructuring Proceedings would be at risk. As such, the relief sought with respect to Centerview is for the benefit of the Applicants and their stakeholders, and should be granted.

Second Fox Affidavit at paras. 12-15, Applicants' Supplementary Motion Record, Tab 1.

F. The Applicants Should be Authorised to Pay Severance Obligations

63. The PSG Entities are seeking authorization to make payments to the Severance Payment Employees during the Restructuring Proceedings. The PSG Entities are seeking the same relief in the Chapter 11 Proceedings.

Second Fox Affidavit at para. 19, Applicants' Supplementary Motion Record, Tab 1.

64. Section 11 of the CCAA provides this Court with the jurisdiction to authorize the PSG Entities to pay the Severance Payment Employees, provided that such an order is otherwise appropriate in the circumstances of this CCAA Proceeding.

CCAA, section 11.

65. Prior to the commencement of the Restructuring Proceedings, the PSG Entities were making payments to former employees on account of termination or severance obligations incurred prior to October 31, 2016.

> Second Fox Affidavit at para. 19, Applicants' Supplementary Motion Record, Tab 1.

66. Currently, the PSG Entities' total severance obligation is approximately USD $3.96 million, of which approximately $1.5 million relates to employees who are not insiders of the Applicants (such employees being the "**Severance Payment Employees**"). Of the total severance obligation, $900,000 relates to former Canadian employees. All Canadian employees qualify as Severance Payment Employees.

> Second Fox Affidavit at paras. 19-21, Applicants' Supplementary Motion Record, Tab 1.

67. As the provisions of the Bankruptcy Code (which the Applicants are subject to in virtue of the Chapter 11 Proceedings) prohibit severance payments to "insiders", the Applicants are only seeking to pay severance to non-insider former employees.

> Second Fox Affidavit at para. 20, Applicants' Supplementary Motion Record, Tab 1.

68. In this case, circumstances exist to make an order authorizing the PSG Entities to pay the severance obligations in the ordinary course appropriate. Making the requested payments will sustain the morale of current employees, which is critical to ensuring smooth operations of the PSG Entities during the pendency of the Restructuring Proceedings.

> Second Fox Affidavit at para. 22, Applicants' Supplementary Motion Record, Tab 1.

G. Super-Priority Status Should be Granted to the CCAA Charges

69. The Initial Order granted the following charges over the Property: the Administration Charge, the ABL DIP Charge, the Directors' Charge and the Intercompany Charge. The priority of the Charges varies depending on the class of collateral at issue.

Second Fox Affidavit at para. 32, Applicants' Supplementary Motion Record, Tab 1.

70. The CCAA provides statutory jurisdiction super-priority to each of the Charges on notice to secured creditors who are likely to be affected by the security or charge. In granting priority to a charge over a debtor's property in a CCAA proceeding and in accordance with the requirements of the CCAA, Courts will consider whether notice has been given to the secured creditors who are likely to be affected by the security or charge. In this case, the PSG Entities have given notice to all parties likely to be affected by the granting of super-priority.

Canwest Global at paras. 32, 39 and 46, Applicants BOA, Tab 14.

Second Fox Affidavit at para. 34, Applicants' Supplementary Motion Record, Tab 1.

71. Granting super-priority to the Charges over all security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**") is necessary in order to maintain the services being provided by the Charges' beneficiaries; without these services, the PSG Entities' ability to successfully complete the Restructuring Process would be at risk. In the circumstances, extending super-priority status on the terms sought is appropriate.

Second Fox Affidavit at paras. 34-35, Applicants' Supplementary Motion Record, Tab 1.

H. The Stay Period Should Be Extended

72. Pursuant to section 11.02 of the CCAA, the Court may extend the stay of proceedings where: (a) circumstances exist that make the order appropriate; and (b) the debtor companies have acted and are acting in good faith and with due diligence.

CCAA, s. 11.02.

73. In *Canwest Global Communications Corp. (Re)*, the Court granted an extension of the Stay Period to ensure the necessary stability to allow the debtors to continue working towards a solution that would result in their businesses continuing as a going concern. The factors which supported the decision were (a) the cash-flow forecast indicated that the

debtors had sufficient cash resources to operate throughout the extension of the stay period, (b) the monitor supported the extension, (c) there was a lack of opposition to the motion, and (d) the debtors had acted and were continuing to act in good faith and with due diligence.

> *Canwest Global Communications Corp. (Re)*, [2009] O.J. No. 4788 (S.C.J. [Comm. List]) at para. 43, Applicants' Book of Authorities, Tab 23.

74. In this case, as in *Canwest Global*, an extension of the Stay Period to February 28, 2017 will allow the Applicants to continue to pursue carryout the Bidding Procedures, if approved, and consummate the resulting sale transaction. The extension will also provide the stability necessary for the PSG Entities to continue their daily business operations.

> First Fox Affidavit at paras. 45-46, Applicants' Motion Record, Tab 2.

75. The Applicants are projected to have the liquidity to operate through to February 28, 2017. No creditor will suffer any material prejudice if the Stay Period is extended.

> First Fox Affidavit at para. 47, Applicants' Motion Record, Tab 2.

76. As of the date of this factum, the PSG Entities are unaware of any opposition to the requested stay extension. The Applicants have acted and continue to act in good faith and with due diligence and the Monitor supports extending the Stay Period to February 28, 2017.

> First Fox Affidavit at paras. 47-48, Applicants' Motion Record, Tab 2.

PART V - ORDER SOUGHT

77. For all of the foregoing reasons, the PSG Entities request orders approving the Stalking Horse Agreement and Bidding Procedures, approving the amendments to the Initial Order, and extending the Stay Period until February 28, 2017.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 23 day of November, 2016.

Stikeman Elliott: per HH

Stikeman Elliott LLP
Lawyers for the Applicants

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (C.A.)

2. *Nortel Networks Corp (Re)*, [2009] O.J. No. 3169 (S.C.J. [Commercial List])

3. *Danier Leather Inc., Re,* 2016 ONSC 1044

4. *CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd.*, 2012 ONSC 1750 [Commercial List]

5. *Re Tiger Brand Knitting Co.* (2005), 9 C.B.R. (5th) 315 (Ont. S.C.J.)

6. *Brainhunter Inc. (Re)*, 2009 CarswellOnt 8207 (S.C.J. [Commercial List])

7. *Peoples Department Stores Inc. (Trustee of) v. Wise*, [2004] 3 S.C.R. 461

8. *BCE Inc. v. 1976 Debentureholders*, [2008] 3 S.C.R. 560

9. *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6

10. *Unique Broadband Systems Inc. (Re)*, 2014 ONCA 538

11. *US Steel Canada Inc. (Re)*, 2015 ONSC 2523

12. *Mustang GP Ltd. (Re)*, 2015 ONSC 6562

13. *Canwest Global Communications Corp. (Re)*, 2009 CarswellOnt 6184

14. *Calpine Canada Energy Limited (Companies' Creditors Arrangement Act)*, 2006 ABQB 743

15. *Northstar Aerospace, Inc.* (Re), 2012 ONSC 3974

16. *Barzel Industries Canada Inc., Re,* 2009 CarswellOnt 9132

17. *Eddie Bauer of Canada, Inc. (Re)* (2009), 55 C.B.R. (5th) 33 (Ont. S.C.J. [Comm List])

18. *Canwest Global Communications Corp. (Re)*, Toronto CV-09-8396-00CL (Ont. S.C.J. [Comm. List]), Initial Order (October 6, 2009)

19. *Target Canada Co. et al (Re)*, Toronto CV-15-10832-00CL (Ont. S.C.J. [Comm. List]), Initial Order (January 15, 2015)

20. *Canwest Publishing Inc. (Re)*, 2010 ONSC 222

21. *Target Canada Co. (Re)*, 2015 ONSC 303

22. *Essar Algoma Steel Inc. (Re)*, (29 January 2016), Toronto, Court File No. CV-15-000011169-00CL (S.C.J. [Comm. List])

23. *Canwest Global Communications Corp. (Re)*, [2009] O.J. No. 4788 (S.C.J. [Comm. List])

SCHEDULE "B"
RELEVANT STATUTES

Companies' Creditors Arrangement Act, **R.S.C. 1985, c. C-36**

General power of court

11 Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

[...]

Interim financing

11.2 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

Priority — secured creditors

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

Priority — other orders

(3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

Factors to be considered

(4) In deciding whether to make an order, the court is to consider, among other things,

> (a) the period during which the company is expected to be subject to proceedings under this Act;
>
> (b) how the company's business and financial affairs are to be managed during the proceedings;
>
> (c) whether the company's management has the confidence of its major creditors;
>
> (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
>
> (e) the nature and value of the company's property;

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the monitor's report referred to in paragraph 23(1)(b), if any.

[...]

Court may order security or charge to cover certain costs

11.52 (1) 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.

Priority

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

[..]

Restriction on disposition of business assets

36 (1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

Notice to creditors

(2) A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

Factors to be considered

(3) In deciding whether to grant the authorization, the court is to consider, among other things,

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the monitor approved the process leading to the proposed sale or disposition;

(c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

Additional factors — related persons

(4) If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that

(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and

(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

Related persons

(5) For the purpose of subsection (4), a person who is related to the company includes

(a) a director or officer of the company;

(b) a person who has or has had, directly or indirectly, control in fact of the company; and

(c) a person who is related to a person described in paragraph (a) or (b).

Assets may be disposed of free and clear

(6) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

Restriction — employers

(7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(4)(a) and (5)(a) if the court had sanctioned the compromise or arrangement.

Business Corporations Act, S.B.C. 2002, c 57

Duties of directors and officers

142 (1) A director or officer of a company, when exercising the powers and performing the functions of a director or officer of the company, as the case may be, must

(a) act honestly and in good faith with a view to the best interests of the company,

(b) exercise the care, diligence and skill that a reasonably prudent individual would exercise in comparable circumstances,

(c) act in accordance with this Act and the regulations, and

(d) subject to paragraphs (a) to (c), act in accordance with the memorandum and articles of the company.

(2) This section is in addition to, and not in derogation of, any enactment or rule of law or equity relating to the duties or liabilities of directors and officers of a company.

(3) No provision in a contract, the memorandum or the articles relieves a director or officer from

(a) the duty to act in accordance with this Act and the regulations, or

(b) liability that by virtue of any enactment or rule of law or equity would otherwise attach to that director or officer in respect of any negligence, default, breach of duty or breach of trust of which the director or officer may be guilty in relation to the company.

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

Court File No: CV-16-11582-00CL

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF PERFORMANCE SPORTS GROUP LTD. ET AL.

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

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(RETURNABLE NOVEMBER 30, 2016)

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