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 OLD PSG WIND-DOWN LTD., OLD BHR WIND-DOWN CORP., OLD BPSU WIND-DOWN CORP., OLD BPSDS WIND-DOWN CORP., OLD EBS WIND-DOWN CORP., OLD PLG WIND-DOWN CORP., OLD PSGI WIND-DOWN CORP., OLD BHR INC., OLD BH INC., OLD BPSU INC., OLD BPSCI INC., OLD BPSUSH INC., OLD EBS INC., OLD PLG INC., AND OLD PSGI INC.

**(Applicants)**

# FACTUM OF THE APPLICANTS
**(Re: Stay Extension and Other Relief)**

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**TO: THE SERVICE LIST**

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**(Applicants)**

## PART I - INTRODUCTION

1. On October 31, 2016, the Applicants were granted protection from their creditors under the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36, as amended (the "**CCAA**") pursuant to an Order (as amended and restated, the "**Initial Order**") of this Court (the "**Canadian Court**"). On the same date, the Applicants also filed for creditor protection (the "**Chapter 11 Proceedings**") in the United States Bankruptcy Court for the District of Delaware (the "**U.S. Court**" and together with the Canadian Court, the "**Courts**") under Chapter 11 of Title 11 of the U.S. Code (the "**U.S. Bankruptcy Code**").

2. Ernst & Young Inc. was appointed as monitor (the "**Monitor**") of the Applicants in the CCAA proceedings (the "**CCAA Proceedings**" and together with the Chapter 11 Proceedings, the "**Restructuring Proceedings**").

3. This motion is brought by the Applicants seeking an Order:

(a) Extending the Stay Period (as defined by the Initial Order) to August 1, 2017; and

(b) Suspending the Monitor's obligation to file quarterly reports with the Canadian Court pursuant to s. 23(1)(d)(ii) of the CCAA; and

(c) Approving the fees and activities of the Monitor and its counsel.

## PART II - THE FACTS

4. The Applicants formerly designed, developed, manufactured, marketed and sold performance sports equipment and accessories for ice hockey, roller hockey, lacrosse, baseball and softball, as well as related apparel.

> Affidavit of Brian Fox sworn April 24, 2017 (the "**Fox Affidavit**") at para. 4, Applicants' Motion Record, Tab 2.

5. In response to a confluence of significant negative events affecting the Applicants' business and leading to a liquidity crisis, the Applicants sought and obtained creditor protection under the CCAA and U.S. Bankruptcy Code on October 31, 2016.

> Fox Affidavit at paras. 5, Applicants' Motion Record, Tab 2.

6. An essential component of the Applicants' restructuring was the going concern sale of substantially all of their assets following a comprehensive marketing and sales process.

> Fox Affidavit at para. 7, Applicants' Motion Record, Tab 2.

7. On February 6, 2017, the Courts issued and entered orders, among other things, approving the stalking horse asset purchase agreement dated October 31, 2016, as amended (the "**Asset Purchase Agreement**") for the sale of substantially all of the Applicants' assets to 9938982 Canada Inc. or its designate (in either case, the "**Purchaser**"). Closing of the transaction contemplated under the Asset Purchase Agreement was announced on February 28, 2017 (the "**Closing**").

Fox Affidavit at paras. 8 - 9, Applicants' Motion Record, Tab 2.

8. Since the Closing, the Applicants have engaged in administering the estates with a view to winding up the Restructuring Proceedings in a cost- and time-efficient manner.

Fox Affidavit at para. 11, Applicants' Motion Record, Tab 2.

## PART III - ISSUES

9. The issues on this motion are:

(a) Whether the Stay Period should be extended to August 1, 2017;

(b) Whether the Monitor's obligation to file quarterly reports with the Canadian Court pursuant to s. 23(1)(d)(ii) of the CCAA should be suspended;

(c) Whether the fees and activities of the Monitor and its counsel should be approved.

## PART IV - LAW AND ARGUMENT

### A. The Stay Period should be extended

10. Pursuant to section 11.02 of the CCAA, the Court may extend the stay of proceedings with respect to debtor companies 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.

11. In *Canwest Global Communications Corp. (Re)*, the Court granted an extension of the stay of proceedings based on the following factors (a) the cashflow 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 (Ont. S.C.J. [Comm. List]) at para. 43, Applicants' Book of Authorities, Tab 1.

12. During the extension of the Stay Period, the Applicants intend to:

(a) Continue addressing post-Closing matters ancillary to the sale transaction, including allocation and reconciliation issues and potential litigation with the Purchaser regarding a deduction of a real property lease liability to the purchase price under the Asset Purchase Agreement;

(b) Develop and conduct a claims processing protocol to have all claims finally determined for distribution purposes;

(c) Work with the Monitor, their advisors and stakeholders, including the Applicants' equity and unsecured creditors' committees, to determine the nature of the wind up and mechanism to distribute the proceeds from the sale of their assets to their stakeholders; and

(d) Address any other issues as they arise in the Restructuring Proceedings.

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

13. The Applicants have acted and continue to act in good faith and with due diligence and the Monitor supports the extension of the Stay Period to August 1, 2017. No creditor will suffer any material prejudice if the Stay Period is extended as requested. The proceeds available from

the sale are sufficient to continue paying the administrative expenses necessary to wind up the Restructuring Proceedings.

> Eighth Report of the Monitor dated April 27, 2017 (the "**Eighth Report**") at paras. 22 - 24.
>
> Fox Affidavit at paras. 17 - 18, Applicants' Motion Record, Tab 2.

14. The Applicants are currently unaware of any opposition to the requested stay extension.

## B. Quarterly Reporting by the Monitor should be suspended

15. Section 23(1)(d)(ii) of the CCAA requires that the Monitor to file a report with the court on the state of the company's business and financial affairs - containing the prescribed information - not later than 45 days, or any longer period that the court may specify, after the day on which each of the company's fiscal quarters ends (the "**Quarterly Reporting**"). Despite the reference to "prescribed information", the CCAA regulations do not prescribe the nature of the information to be included in the Quarterly Reporting.

> CCAA, s. 23(1)(d)(ii).

16. Section 23(1)(d)(ii) specifically provides that the court may specify a longer time period for the Monitor to file its Quarterly Reporting. It is appropriate in circumstances such as these, where the Applicants have no operations and the Monitor would have limited information to report, to suspend the Quarterly Reporting pending further order of the Canadian Court. Certain financial information and other information pertaining to PSG will continue to be available through the Applicants' court filings and the Monitor's reports, and the Unsecured Creditors' Committee and Equity Committee are regularly consulted during the Restructuring Proceedings.

Eighth Report at para. 27.

Fox Affidavit at paras. 25, Applicants' Motion Record, Tab 2.

17. Dispensing with the requirement will reduce the administrative tasks that need to be performed by the Applicants and the Monitor, reducing costs incurred by the estates. The Canadian Court may order that the Quarterly Reporting be resumed if it would be helpful or beneficial at a later date.

Eighth Report at para. 27.

Fox Affidavit at paras. 20, Applicants' Motion Record, Tab 2.

**C. The Monitor's activities and fees should be approved**

18. The Monitor has assisted and continues to assist the Applicants and stakeholders through the Restructuring Proceedings by carrying on various activities described in their reports filed with the Canadian Court in the CCAA Proceedings including, responding to creditors' enquiries, monitoring the Applicants' receipts and disbursements, monitoring post-Closing matters in respect of the sale transaction, exchanging with the Applicants and their advisors on aspects related to the restructuring, and coordinating the claims process.

Eighth Report, at paras. 21, 36.

19. The Monitor has requested the Canadian Court approve its fees and activities to date. Approving Monitor's fees and activities is common relief granted by courts under the CCAA. Paragraph 37 of the Initial Order provides that:

> **THIS COURT ORDERS** that the Monitor and its United States and Canadian Counsel shall pass their accounts from time to time, and for this purpose the accounts of the Monitor and its United States and Canadian counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

Initial Order, paragraph 37.

20. In *Target Canada Co. (Re)*, the court recognized that "there are good policy and practical reasons for the court to approve of Monitor's activities and providing a level of protection for Monitors during the CCAA process."

*Target Canada Co. (Re)*, 2015 ONSC 7574 at para. 22; Applicants' Book of Authorities, Tab 2.

21. Approving the Monitor's activities will allow for certainty for the Monitor and protect creditors from a delay in distributions that would be caused by re-litigation of steps taken to date.

22. The Monitor has requested that unredacted copies of invoices from their counsel be sealed from the public record. Section 137(2) of the *Courts of Justice Act* provides that the Court may seal documents from the public record. In *Sierra Club of Canada v. Canada (Minister of Finance)*, the Supreme Court of Canada adopted the following test to determine when a sealing order should be made:

> A confidentiality order under Rule 151 should only be granted when:
>
> (a) such an order is necessary in order to prevent serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh the deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

*Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 at para. 53, Applicants' Book of Authorities, Tab 3.

*Courts of Justice Act*, RSO 1990, c C.43, s. 137(2)

23. The redacted information in the Monitor's counsel invoices may contain sensitive and/or privileged information and it is appropriate to protect the information by sealing the unredacted invoices.

## PART V - ORDER REQUESTED

24. For all of the foregoing reasons, it is appropriate for the Canadian Court to grant the requested Order in the form sought by the Applicants.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 28th day of April, 2017.

*/s/ Stikeman Elliott LLP*
Stikeman Elliott LLP
Lawyers for the Applicants

## SCHEDULE "A"
## LIST OF AUTHORITIES

1. *Canwest Global Communications Corp. (Re)*, [2009] O.J. No. 4788
2. *Target Canada Co. (Re),* 2015 ONSC 7574
3. *Sierra Club of Canada v. Canada (Minister of Finance),* 2002 SCC 41

## SCHEDULE "B"
## RELEVANT STATUTES

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

*Stays, etc. — other than initial application*

(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

*Burden of proof on application*

(3) The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

*Restriction*

(4) Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

…

*Duties and functions*

23 (1) The monitor shall

…

(d) file a report with the court on the state of the company's business and financial affairs — containing the prescribed information, if any —

(i) without delay after ascertaining a material adverse change in the company's projected cash-flow or financial circumstances,

(ii) not later than 45 days, or any longer period that the court may specify, after the day on which each of the company's fiscal quarters ends, and

(iii) at any other time that the court may order;

***Courts of Justice Act,* RSO 1990, c C.43**

*Documents public*

**137** (2) A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.

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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**
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Proceeding commenced at Toronto

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