Court File No. 20-00641220-00CL

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 GREEN GROWTH BRANDS INC., GGB CANADA INC., GREEN GROWTH BRANDS REALTY LTD. AND XANTHIC BIOPHARMA LIMITED

Applicants

FACTUM OF THE RESPONDENT (AND MOVING PARTY BY CROSS-MOTION), MICHAEL D. HORVITZ AS GRANTOR AND TRUSTEE FOR THE MICHAEL D. HORVITZ REVOCABLE TRUST

(Returnable Friday May 29, 2020 at 11:00 a.m.)

May 28, 2020

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I — OVERVIEW

1. The moving party on this cross-motion, Michael D. Horvitz as Grantor and Trustee for and on behalf of the Michael D. Horvitz Revocable Trust ("**Horvitz**"), seeks an Order: (1) to aside the initial Order of The Honourable Justice McEwen dated May 20, 2020 (the "**Initial Order**"); (2) in the alternative, to adjourn the Applicants' comeback motion in order to gather critical evidence through examinations and documents, and obtain section 11.9 *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "**CCAA**") disclosure of economic interests; and (3) in the further alternative, to permit consideration of an alternative insolvency process to that of the Applicants.

2. In seeking this relief, Horvitz relies on the decisions of the Supreme Court of Canada, which indicate that the Court's discretion, although broad in nature, must have the baseline considerations in mind of appropriateness, good faith and due diligence. The Supreme Court has further determined that the chances for successful reorganizations are based on all stakeholders achieving common ground and being treated as advantageously and as fairly as possible.

3. Horvitz's position is that for the reasons that follow, the Applicants have failed to achieve any of these three baseline considerations, and as a result, this Court ought to immediately terminate the protection the Applicants have obtained through the Initial Order. They have not acted in good faith in bringing these proceedings under the CCAA. Rather, the Applicants and certain other non-arm's length parties closely associated with them are using the tools of the CCAA to obtain the Court's blessing of a transaction that only benefits the principals of the Applicants and their close associates, to the prejudice of other stakeholders.

4. The Applicants have put forward what appears to be a normal CCAA application brought on short notice as a result of so-called urgent creditor demands. However, when the layers begin

to be peeled back, there is nothing normal about this proceeding. On the contrary, it is a business story about a wealthy American family attempting to save its failed investment in GGB to the detriment of the other stakeholders who are not part of their inner circle.

5. Unless otherwise stated, defined terms below are ascribed the same meaning as the defined terms in the Michael Horvitz's Affidavit sworn May 28, 2020, and Raymond Whitaker's Affidavit sworn May 19, 2020 (the "**First Whitaker Affidavit**").

II — STATEMENT OF FACTS

Background and Key Players' Interrelatedness

6. On May 20, 2020, Green Growth Brands Inc. ("**GGB**"), GGB Canada Inc. ("**GGB Canada**"), Green Growth Brands Realty Ltd. ("**GGB Realty**"), and Xanthic Biopharma Limited ("**Xanthic Biopharma**", and collectively, the "**Applicants**") sought and received the Initial Order granting them protection under the CCAA.

7. The Applicants (collectively, the "**GGB Group**") are part of a corporate group that is in the business of cultivation processing, and selling of cannabis products primarily in the states of Nevada, Massachusetts and Florida.

8. The respondent (and moving party by cross-motion), is the Michael D. Horvitz Trust, a trust for Michael Horvitz ("**Horvitz**"), an American investor. Horvitz owns $5 million of the May Debenture through the Michael D. Horvitz Revocable Trust.

> Responding and Cross-Motion Record ("**RCMR**") Tab 2, Affidavit of Michael Horvitz sworn May 28, 2020 ("**Horvitz Affidavit**") at para. 32

9. Although not mentioned in the Applicants' Application Record, the true key players in this story are Jay Schottenstein, Joseph Schottenstein, and Wayne Boich ("**Boich**"), and the American corporations they own and control.

10. Jay Schottenstein is a wealthy American businessman, and along with his son Joseph Schottenstein, through their various corporate vehicles are the true controlling minds behind GGB.

RCMR, Tab 2, Horvitz Affidavit at paras. 18-19

11. The Schottensteins control the following key companies:

(a) All Js Greenspace LLC ("**All Js**"): GGB's major and controlling shareholder, which also happens to be the DIP lender, the Stalking Horse bidder, and the owner of the majority of the Backstop Debentures;

(b) LS Green Investments LLC ("**LS Green**"): the holder of USD $20,000,000 of the May Debentures.

(c) Delancey Financial LLC ("**Delancey Financial**"): the holder of USD $10,000,000 of the May Debentures.

RCMR, Tab 2, Horvitz Affidavit at paras. 25-27

12. Boich is an American investor who controls WMB Resources, LLC ("**WMB Resources**") the holder of USD $5,000,000 of the May Debentures. He is also affiliated with (and likely owns and controls) Green Ops Group LLC – the company that acquired the GAOC Note and is also poised to potentially acquire the Florida medical cannabis dispensary licences from GGB through these CCAA proceedings.

RCMR, Tab 2, Horvitz Affidavit at paras. 22, 28-29

Background of Michael Horvitz Investment into GGB

13. In the summer of 2018, Sean Posner ("**Posner**"), a Miami Beach investor and deal broker, introduced Horvitz to his childhood friend Adam Arviv ("**Arviv**"), to canvass Horvitz' interest to invest in what would end up being GGB. Horvitz was advised that GGB had the backing of the Schottenstein family. This meeting led to a subsequent potential GGB investors' meeting with Posner, Peter Horvath (then the GGB CEO), Shawn Dym (a director of Aphria Inc.), Posner, Boich, and several others. Following the meeting, Horvitz purchased USD $3.25 million worth of shares in GGB persuaded by the Schottensteins involvement in the venture.

RCMR, Tab 2, Horvitz Affidavit at paras. 22, 28-29, 39-40

Horvitz's Purchase of the May Debenture

14. In early May 2019, already an investor in GGB, Posner approached Horvitz for a second investment. On or around May 8, 2019, Horvitz had a conference call with Posner, Benton Kraner ("**Kraner**") (Kraner is the Schottensteins' right-hand man), and Joseph Schottenstein to negotiate the terms of the May Debenture deal. Horvitz directly negotiated the terms of the May Debenture with Joseph Schottenstein and Kraner, although they both had no official capacity with GGB, but it appeared that they were making the decisions for GGB.

RCMR, Tab 2, Horvitz Affidavit at paras. 45-46

15. On the call, Horvitz negotiated for the May Debentures to be secured. Kraner also assured Horvitz that GGB would be raising funds through a public offering, which would payout the GAOC Note, thereafter putting the May Debentures into first priority. (Although GGB ended up doing the public offering, the funds were never used to payout the GAOC Note). Joseph Schottenstein and Kraner confirmed to Horvitz that GGB's most valuable assets were the Nevada cannabis licences. Horvitz was also advised that the Schottensteins would be investing USD $30

million into the May Debentures (which was ultimately done through a USD $20 million investment by LS Green and a USD $10 million investment by Delancey Financial).

RCMR, Tab 2, Horvitz Affidavit at paras. 46-47

16. Through the Michael D. Horvitz Revocable Trust, Horvitz purchased USD $5 million of the total issued USD $45 million in May Debentures. Boich also purchased USD $5 million of the May Debentures through WMB Resources, and the Schottensteins did acquire USD $30 million through LS Green and Delancey.

RCMR, Tab 2, Horvitz Affidavit at paras. 49-50

17. The May Debentures have: (1) a maturity date of May 17, 2020; (2) 15% interest rate; (3) and on maturity, at the holders' option provide for either payment in cash of principal plus interest or, convert it into shares of GGB. The May Debentures also have general security agreement over the assets of GGB, second in priority only to the GAOC note.

RCMR, Tab 2, Horvitz Affidavit at para. 51 and Exhibit 12

18. Pursuant to the terms of the Debenture Indenture, in the event May Debentureholders wish to make a material change to their rights under the indentures, the terms require that notice of meetings be provided to all registered Debentureholders on 21 days-notice in writing. The notice is to state briefly the general nature of the business for the meeting together with enough information as is reasonably necessary to enable the Registered Debentureholders to make a reasoned decision on the matter. Powers exercisable by Extraordinary Resolution, including any modification, abrogation, alteration, compromise, or arrangement of the rights of the Debentureholders must be passed at a meeting by the "requisite majority" of 66.66% of the aggregate amount of registered Debentureholders.

RCMR, Tab 2, Horvitz Affidavit at paras. 75-76 , Exhibit "D" to First Whitaker Affidavit

The Backstop Debentures

19. Shortly after Horvitz purchased the May Debentures, Posner, on behalf of the Schottensteins, asked Horvitz to agree to an extension of the maturity of the May Debentures to two years, which he refused, as Horvitz was not offered additional security and the GGB stock was already in serious decline.

RCMR, Tab 2, Horvitz Affidavit at para. 53

20. Following Horvitz's purchase of the May Debentures, GGB needed to raise further funding. This was partially since GGB opted to aggressively expand its CBD business into shopping mall kiosks, rather than the initially planned wholesale CBD distribution. GGB took two steps to raise further funding.

RCMR, Tab 2, Horvitz Affidavit at para. 53

21. First, in July 2019 GGB initiated a public offering to raise CAD $52 million. The CAD $52 million public offering was meant to pay out the GAOC note, but this never happened. Second, on August 14, 2019, GGB issued the Backstop Debentures with security junior to the May Debentures in an amount up to CAD $102 million. The Backstop Debentures were created to satisfy the Canadian regulators of GGB's finances and liquidity. All Js committed up to USD $57,350,000 and Chiron (Arviv's corporation) committed up to USD $10 million of the Backstop Debentures. GGB paid All Js and Chiron, in aggregate, a fee of USD $3,866,250 for entering into the Backstop Debentures. However, these Backstop Debentureholders funded only USD $23.7 million. The purpose of the Backstop Debentures was, in part, to pay out the May Debentures. The Backstop Debentures were in default when the May Debentures came due and were not paid, but it appears that GGB never issued notice of default to the Backstop Debentures.

RCMR, Tab 2, Horvitz Affidavit at para. 53

22. In November 2019, Jay Schottenstein personally guaranteed the full amount of the $39 million GAOC Note.

GGB's Financial Decline and Insolvency by September 2019

23. In January 2020, Horvitz met with Randy Whitaker and Jay Schottenstein on Jay Schottenstein's yacht "Just Js". During that meeting, Mr. Whitaker advised Horvitz that GGB had been insolvent since September 2019. Jay Schottenstein was dismissive of Mr. Whitaker's comments. Instead of pursuing a restructuring at that time, GGB waited.

RCMR, Tab 2, Horvitz Affidavit at para. 53(d)

24. On March 15, 2020, the $39 million GAOC Note (that was guaranteed by Jay Schottenstein) matured and GGB defaulted on its obligations.

RCMR, Tab 2, Horvitz Affidavit at para. 58

The Undisclosed Boich Deal No. 1: Acquisition of the GAOC Note

25. On May 4, 2020, just weeks before the onset of this proceeding, Boich's company, Green Ops, purchased the GAOC Note from GAOC (the "**Green Ops Agreement**"). Neither the agreement nor its terms have been disclosed to the Court. The First Whitaker Affidavit suggests the GAOC Note was purchased by WMB Resources, but information subsequently provided by counsel for the Applicants suggests it was acquired by Green Ops. Both are Boich corporations, so the distinction is immaterial.

RCMR, Tab 2, Horvitz Affidavit at paras. 58-59

26. Even more importantly, around the same time, Boich entered into a second private side agreement with Jay Schottenstein and/or GGB with respect to his acquisition of the GAOC Note (the "**Secondary Agreement**").

RCMR, Tab 2, Horvitz Affidavit at para. 60

27. The existence of the Secondary Agreement was not disclosed to the Court on the Initial Application, and despite Horvitz's lawyers' demands, *still* has not been disclosed. Horvitz understands that the background to, and the details of, the Secondary Agreement are as follows:

(a) at Joseph Schottenstein's encouragement, Boich purchased the CAD $39 million GAOC Note for approximately USD $18.5 million from GAOC;

(b) the Secondary Agreement was primarily negotiated between Jay Schottenstein (or his advisors) and not with Mr. Whitaker, the CEO of GGB;

(c) the Secondary Agreement resulted in the termination of the CAD $39 million personal guarantee that was given by Jay Schottenstein in connection with the GAOC Note;

(d) Boich will receive 25% of the equity in a new entity being formed to subsequently acquire GGB ("**Acquire Co**.");

(e) the full amount of CAD $39 million was recast into American funds at a midpoint of historical conversion ranges, and remains outstanding to be repaid by GGB or its successor corporation (the **"WMB Debt**");

(f) interest runs on the full face value of the WMB Debt at the rate of 15% *per annum* (substantially increased from the original 3% rate) payable in the second year but accruing immediately;

(g) Boich will be entitled to designate an equal number of members to Acquire Co.'s Board as the Schottensteins, with one additional independent Board member;

(h) Boich will be provided a veto right for new capitalizations of Acquire Co., so as to ensure that his equity position is not diluted; and,

(i) Schottenstein, through All Js, would fund the DIP, unusually made junior in priority behind Boich's note;

RCMR, Tab 2, Horvitz Affidavit at para. 61

28. The implications of the Secondary Agreement are significant because:

(a) the details of the Green Ops Agreement, the Secondary Agreement, the negotiations of the Secondary Agreement, and the Jay Schottenstein personal guarantee should all have been disclosed to the Court in the initial CCAA application considering their material impact on GGB and its creditors;

(b) it demonstrates the amount of self-dealing conducted by the Schottensteins to the detriment of GGB shareholders and creditors. This is exemplified by Boich's representations to Horvitz that the Secondary Agreement was negotiated primarily with the Schottensteins and their advisors, and not GGB even though it materially impacted GGB. This deal was negotiated just weeks before the CCAA application;

(c) the Jay Schottenstein personal guarantee stood to protect GGB's position. It also ultimately benefitted creditors junior in priority to the GAOC Note, such as Horvitz, since Jay Schottenstein is a credit worthy alternative source to repay the GAOC Note. Instead of obtaining anything of material value back to GGB, GGB traded a release of Jay Schottenstein on his personal guarantee for lucrative (and likely undervalued) inducements to Boich through his corporations;

(d) the GAOC Note remains in default, to the prejudice of GGB's stakeholders, including Horvitz. Now there is no protection from the Jay Schottenstein guarantee, and yet GGB still owes the same amount of (or possibly more considering the currency conversion) debt on the GAOC Note, and has to pay 12% higher interest than was initially payable under the GAOC Note; and,

(e) had Jay Schottenstein paid off the GAOC Note, the May Debenture would be in first priority.

RCMR, Tab 2, Horvitz Affidavit at para. 62

The Undisclosed Boich Deal No. 2: Acquisition of the Spring Oaks Notes

29. On June 3, 2019, GGB Florida LLC ("**GGB Florida**") purchased all of the shares of a company called Spring Oaks. In the First Whitaker Affidavit, the "Spring Oaks Notes" are explained as a 15% convertible secured note issued to Spring Oaks' representative in the amount of USD $5,800,000, and a 15% convertible secured note in the amount of USD $11,400,000 with a two year term. The Spring Oaks Notes are secured against all of GGB Florida LLC's assets.

RCMR, Tab 2, Horvitz Affidavit at paras. 95-96

30. As set out above Green Ops is a corporation affiliated with Boich. On May 4, 2020 (just weeks before the onset of this CCAA proceeding, and the same date that Green Ops obtained the GAOC Note), GGB received notice that Green Ops had acquired the Spring Oaks Notes. Neither the purchase price nor the related agreement by which Green Ops acquired the Spring Oaks Notes have been disclosed to the Court. Boich advised Horvitz, in the first half of May 2020, that Green Ops paid approximately USD $10 million for the Spring Oaks Notes.

RCMR, Tab 2, Horvitz Affidavit at paras. 97

31. With respect to the possible "Florida Sale" of GGB Florida to an "interested party" described at paragraph 60 of the First Whitaker Affidavit, there is no description or information provided, nor device in the proposed DIP that allows for future backup buyers to replace the current prospective buyer if the current Florida Sale fails to close. Boich also advised Horvitz that the purchase price pursuant to the Florida Sale is approximately [redacted] If the transaction is not closed by July 29, 2020, then Green Ops will not grant any further forbearance and will realize on its security, and in so doing will receive the Florida cannabis licenses with no further effort or cost. Accordingly, the risk that those valuable assets will simply be lost to Green Ops (and therefore to Boich) appears very real.

RCMR, Tab 2, Horvitz Affidavit at paras. 98-99

32. The First Report of the Monitor dated May 26, 2020 refers to a signed Letter of Intent for the purchase of GGB Florida LLC and its subsidiaries that contemplates a "definitive agreement" to be signed by June 12, 2020, with a closing of July 12, 2020. However, the Letter of Intent has not been disclosed to the Court (the Applicants' has deemed this document as being confidential). Similarly, there has been no disclosure of the purchase price or even of the identity of the purchaser, who is referred to only as an "interested party".

RCMR, Tab 2, Horvitz Affidavit at paras. 98-99

Business Team and Andrew Jolley Recruitment by Boich

33. In the first half of May, 2020, Boich advised Horvitz that he had already assembled a business team for Acquire Co., which includes Andrew Jolley ("**Jolley**"). Jolley is a key Nevada cannabis person, considering he was a co-owner and founder of The Source, the company GGB acquired which holds many of the GGB Groups' Nevada state cannabis licenses. As well, Jolley serves on the Nevada Green Ribbon Panel and is President of the Nevada Dispensary Association.

RCMR, Tab 2, Horvitz Affidavit at paras. 64-65

34. The Nevada state licenses are the most valuable assets owned by the GGB Group, especially in light of the Las Vegas stores and licenses. Given Jolley's position and status in Nevada, he appears to be an invaluable component in maintaining the good standing of the GGB Nevada cannabis licenses. Boich therefore appears to be strategically setting up Acquire Co. in advance, to successfully maintain the licences which will be to his significant benefit through the shareholding interest he is poised to receive in Acquire Co., and to his even greater benefit if he ends up owning 100% of Acquire Co.

RCMR, Tab 2, Horvitz Affidavit at paras. 68-69

Extraordinary Resolutions Passed Without Notice Days Prior to CCAA

35. On May 3, 2020, the May Debentureholders are said by the Applicants to have passed an Extraordinary Resolution (the "**May 3 Resolution**") that permitted the incurrence of new senior indebtedness, and related security, thereby allowing the All Js Secured Notes to rank senior in priority to the May Debentures.

RCMR, Tab 2, Horvitz Affidavit at para. 74

36. On May 18, 2020, just one day before the First Whitaker Affidavit and two days before the Initial Order, the May Debentureholders are said by the Applicants to have passed an Extraordinary Resolution (the "**May 18 Resolution**") by which they purportedly agreed to approve the proposed Acquisition Agreement (which is the Stalking Horse bid), having the anticipated effect of converting the May Debentures into undisclosed diluted share equity in Acquire Co. through the SISP order. The Backstop Debentureholders apparently agreed to the same terms through an Extraordinary Resolution of their own (the "**May 18 Backstop Resolution**").

RCMR, Tab 2, Horvitz Affidavit at paras. 81-83, 91,

37. The May 18 Backstop Resolution is also to approve the SISP which implements the Stalking Horse, by which the Schottensteins seek to elevate the junior Backstop Debentures onto the same level of the May Debentures, which were always senior to the Backstop Debentures. If fully advanced, would total USD $67,350,000 (USD $57,350,000 belonging to All Js and USD $10 million to Chiron). GGB can contractually require All Js as a Backstop Debentureholder, to subscribe to Backstop Debentures up to USD $36,750,000 in the event that the maturity date of the May Debentures (May 17, 2020) could not be extended. GGB opted not to call on All Js to extend this funding, although the amount of the funding would be enough to pay out all of the May Debentureholders who are not Schottenstein corporations. Instead of calling on the Backstop

Debentures for the purpose for which they were created, the Schottensteins have elevated the Backstop Debentures to the same level as the very May Debentures they were always intended to pay out.

RCMR, Tab 2, Horvitz Affidavit at paras. 88-91

38. Horvitz was <u>not provided with any advance notice</u> of the May 3 Resolution, the May 18 Resolution (or the May 18 Backstop Resolution), in clear breach of the notice and voting provisions contained in the May Debenture Indenture. The May 18 Resolution and the May 18 Backstop Resolution were omitted by the Applicants from the Application Record, and were then only disclosed to the Court in the Comeback Motion Record. Notice of the May 18 Resolution appears to only have been given to Schottenstein corporations including AD Greenleaf, Delancey, LS Green, and to Boich's corporation, WMB. Horvtiz has deposed that had he been provided advanced notice, he would have immediately moved for an injunction to restrain the Applicants from proceeding on the basis of self-dealing and wrongful preferences.

RCMR, Tab 2, Horvitz Affidavit at paras. 74, 77, 80, 83, 85

Boich Step Transaction to 100% Ownership in GGB

39. As set out above, since the Secondary Agreement gives Boich the ultimate power to veto any capitalizations that will dilute his equity in Acquire Co., it will be within his control to prevent Acquire Co. from raising capital for any reason, including but not limited to, repaying either the principal or interest on the WMB Debt. Boich will therefore himself be empowered to cause a default scenario for the WMB Debt. As a result, WMB (or Green Ops), through the purchase of the GAOC Note and the related General Security Agreement dated April 15, 2019 (referred to at paragraph 36 of the First Whitaker Affidavit), may be able to acquire all GGB equity and extinguish its debt, to the detriment of the May Debentureholders. Presumably, Green Ops would

have acquired the General Security Agreement securing the GAOC Note in connection with its purchase, however the Applicants have not disclosed this to the court.

RCMR, Tab 2, Horvitz Affidavit at para. 71

40. As set out above, given the fact that the May 18 Resolution sets forth that Horvitz's May Debenture will be converted to equity of Acquire Co., it is essential that Horvitz, and other creditors, as well as the Court, completely understand Acquire Co.'s financial issues, and the details of this conversion. For instance, the percentage equity interest into which the May Debentures will be converted have not been disclosed.

RCMR, Tab 2, Horvitz Affidavit at para. 72

III — ISSUE

41. The issues to be determined by the Court are:

(a) whether the Initial Order should be set aside and declared terminated and *void ab initio* for the Applicants' failure to make full and fair disclosure;

(b) if not, whether the Applicants' Comeback Motion should be adjourned, and the balance of the relief sought on Horvitz's cross-motion granted.

IV — LAW AND ARGUMENT

a) Applicable Law of CCAA Proceedings

42. The purpose of the CCAA is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets.

Century Services Inc. v. Canada (Attorney General), 2010 SCC 60 at para. 15 (CanLII) [*Century Services*].

43. The CCAA confers upon Courts the "broad and flexible authority" to make the orders necessary to facilitate the reorganization of the debtor and achieve the CCAA's objectives. The primary purpose of the Court exercising its discretion for DIP financing under section 11.2 is to secure financing required by the debtor during CCAA proceedings. A further purpose of section 11.2 interim financing is to enhance the prospects of a plan of compromise or arrangement that will lead to a continuation of the company in a restructured form or plan approval.

CCAA, s, 11., 11.2

Century Services at para. 19 (CanLII).

Re Crystallex International Corporation, 2012 ONCA 404 at para. 66 (CanLII) [*Crystallex*].

44. In deciding whether to make an order for interim or DIP financing, the Court is to consider the following factors, among others:

(a) the period during which the company is expected to be subject to proceedings under the CCAA;

(b) how the company's business and financial affairs are to be managed during the proceeding;

(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 plan of arrangement;

(e) the nature and value of the company's property;

(f) whether any creditor would be materially prejudiced by the security or charge; and

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

CCAA, s. 11.2(4).

45. In addition to the factors enumerated in subsection 11.2(4), the Court must consider whether notice has been given to secured creditors likely to be affected by the security or charge, and whether the amount of the DIP financing is appropriate and required, having regard to the

debtors' cash flow statement. Consistent with subsection 11.2(3) of the CCAA, the Court must ensure that the DIP charge does not secure an obligation that existed before the order was made.

Canwest Global Communications Corp. (Re), 2009 CarswellOnt 6184 at para. 33 (CanLII).

46. While the Court's discretionary authority under the CCAA is broad in nature, it "is not boundless". This authority must be exercised in furtherance of the remedial objectives of the CCAA.

9354-9186 Québec Inc. v. Callidus Capital Corp., 2020 SCC 10 at para. 49 (CanLII) [*Bluberi*].

47. In doing so, the Court must keep in mind three "baseline considerations", which the applicant bears the burden of demonstrating: (1) that the order sought is appropriate in the circumstances; (2) that the applicant has acted in good faith; and (3) the applicant has acted with due diligence.

Century Services at para. 70 (CanLII); *Bluberi* at para. 49 (CanLII).

b) The Order Sought is Not Appropriate in the Circumstances

48. Neither the Initial Order nor the order now sought by the Applicants are appropriate in the circumstances. These orders are in stark contrast to the remedial objectives of the CCAA. Appropriateness under the CCAA is assessed by inquiring whether the order sought advances the policy objectives underlying the CCAA.

Century Services at para. 70 (CanLII).

49. While an objective of the CCAA is to facilitate the reorganization and survival of the debtor company in an operational state, the CCAA is fundamentally insolvency legislation. Thus, it also has simultaneous remedial objectives of ensuring fair and equitable treatment of the claims against a debtor, maximizing creditor recover, preservation of going-concern value where possible,

protecting the public interest, and, in the context of a commercial insolvency, balancing the costs and benefits of restructuring or liquidating the company.

> *Century Services* at para. 70 (CanLII); *Bluberi* at paras. 41-42 (CanLII); *Ernst & Young Inc. v. Essar Global Fund Limited*, 2017 ONCA 1014 at para. 103 (CanLII).

50. Appropriateness extends not only to the purpose of the order, but also to the *means* it employs. Courts should be mindful that the chances for successful reorganizations are enhanced where participants achieve common ground, and all stakeholders are treated as advantageously and fairly as the circumstances permit.

> *Century Services* at para. 70 (CanLII).

51. The procedures set out in the CCAA rely on negotiations and compromise between the debtor and its stakeholders, as overseen by the supervising judge and the monitor. This necessarily requires that, to the extent possible, <u>those involved in the proceedings be on equal footing and have a clear understanding of their respective rights</u>.

> *Bluberi* at para. 51 (CanLII).

52. **Application:** The Initial Order and the further order sought by the Applicants serve only to protect and enhance the interests of the Schottenstein family and its business associate, Boich. It serves to provide judicial protection of transactions that have as their purpose, the conveyance of assets of the debtor to non-arms' length parties, and to the Applicants themselves, or their principals and business associates. At best, the orders serve to undermine the CCAA's purpose.

c) GGB Has Not Acted in Good Faith

53. Parliament has recently enacted section 18.6 of the CCAA, which came into force on November 1, 2019. Subsection 18.6(2) of the CCAA provides that "if the court is satisfied that an

interested person fails to act in good faith […] the court may make any order that it considers appropriate in the circumstances."

CCAA, s. 18.6(2).

54. This statutorily-sanctioned obligation codifies the well-established principle confirmed in *Century Services* that parties must act in good faith in insolvency proceedings. In particular, it confirms that the duty to act in good faith in insolvency proceedings extends to creditors.

Century Services at para. 70 (CanLII).

55. Parliament's decision to impose a statutory duty of good faith was intended to give the courts another tool to ensure fairness in insolvency negotiations and prevent parties from abusing their restructuring process to obtain advantages.

Senate, Standing Senate Committee on Banking, Trade and Commerce, Evidence, 42-1, No 56 (8 May 2019) (Mark Schaan), online: <https://sencanada.ca/en/Content/Sen/Committee/421/BANC/56ev-54778-e>.

56. Good faith is one of the cornerstones of restructuring proceedings. Parliament's codification and extension of this principle – particularly to creditors – gives the Courts another tool to ensure parties act honestly, reasonably and candidly.

Senate, Standing Senate Committee on Banking, Trade and Commerce, Evidence, 42-1, No 56 (8 May 2019) (Mark Schaan), online: <https://sencanada.ca/en/Content/Sen/Committee/421/BANC/56ev-54778-e>; Senate, Standing Senate Committee on Banking, Trade and Commerce, Evidence, 42-1, No 58 (29 May 2019) (Mark Schaan), online: <https://sencanada.ca/en/Content/Sen/Committee/421/BANC/58ev-54827-e>.

57. The common law duty of good faith, which applies to all contracts, requires parties to act "honestly and reasonably and not capriciously or arbitrarily" in contractual performance.

Bhasin v. Hyrnew, 2014 SCC 71 at para. 63 (CanLII).

58. In insolvency proceedings, good faith requires full disclosure of the assets of the debtor and the encumbrances against them. In *Re Kitchener Frame Ltd.*, the Court held that the debtor must satisfy the Court that it has provided full disclosure to its creditors of its assets and

encumbrances against such assets with respect to the requirement of the proposal being made in good faith.

Kitchener Frame Ltd., Re, 2012 ONSC 234 at para. 35 (CanLII) [*Kitchener*].

59. An insolvent person asking for the Court's approval of a proposal must do so in good faith, which requires "full disclosure."

Mayer, Re, 1994 CarswellOnt 268 at para. 6 (CanLII).

60. While *Re Kitchener* and *Re Mayer* were decided in the BIA, not the CCAA, context, the statutes deal with the same subject matter are to be interpreted with the presumption of harmony, coherence and consistency. This principle favours adopting an interpretation of the CCAA that is harmonious, to the greatest extent possible, with the interpretation that has been given to the BIA.

Kitchener at para. 47 (CanLII).

61. Furthermore, on an *ex parte* motion – or one on such short notice that the Defendants have no time to respond – "there is a solemn obligation on an applicant to see that full disclosure is made of all material facts." When discovered, the failure to make full disclosure or the misrepresentation of material facts has been dealt with "severely" by the court, most often resulting in an injunction being set aside on a motion to continue.

Derochie v. Derochie, 2003 ABQB 345, at para 11 (CanLII) [*Derochie*].

62. All applications for *ex parte* insolvency relief require the utmost candor and full disclosure. Prior to requesting *ex parte* relief, applicants must ensure that all relevant financial information is complete, accurate and disclosed to the Court in a fair and open manner, including any potential deficiencies.

Re CanaSea PetroGas Group Holdings Limited, 2014 ONSC 6116 at para. 28 (CanLII) [*CanSea*].

63. The failure to meet this "high obligation" can result in the Court subsequently terminating an entered order or declaring it void *ab initio*. In some cases, the Court has found that if the CCAA Judge had been made aware of certain facts and deficient financial statements, an Initial Order would not have been issued in the first place.

CanaSea at para. 28, 35 (CanLII).

64. This may be necessary to establish a subsidiary's insolvency and to determine the "real debtor" in situations where companies with very little connection to Canada are seeking relief under the CCAA.

CanaSea at paras. 26 (CanLII).

65. While *CanaSea* dealt with an *ex parte* motion, these principles apply to motions where there has been "such short notice" that the responding party has no time to respond. Furthermore, in the bankruptcy and insolvency context, Courts have required that a debtor must satisfy the Court that it has provided full disclosure to its creditors of its assets and encumbrances with respect to the requirements of good faith.

Derochie at para. 11 (CanLII); *Kitchener* at para. 35 (CanLII).

66. **Application:** GGB has failed to disclose and has misrepresented the material facts that the Schottensteins own and control All Js (the DIP lender and the Stalking Horse bidder), the Applicants (through All Js being the controlling shareholder of GGB), and other Schottenstein corporations owning the majority of senior debt (through Delancey and LS Green). GGB has also failed to disclose various non-arms' length material agreements, including the Green Ops Agreement and the Secondary Agreement. The procedure mandated by the DIP and the SISP in respect of the sale of the assets of the Applicants (and therefore, the valuable cannabis licenses across three states) is an unfair and uncompetitive process and is designed to ensure that the

Schottenstein family maintains control of the Applicants' valuable assets. All of the foregoing factors establish that the proceeding has not been brought by the Applicants in good faith or in the best interest of GGB stakeholders who are not part of Schottensteins' inner circle.

67. Further, the DIP and the Stalking Horse bid terms make it impractical, if not impossible, for any arms' length party to make a bid that would properly reflect the market value of the valuable cannabis licenses that GGB holds through its subsidiaries (in particular, the Nevada state licenses described above). The proposed SISP mandated by the DIP terms allows only a "Superior Offer" to be recommended by the Monitor. A Superior Offer must pay the GAOC Note in full and at once, while the Stalking Horse bid can assume this obligation for later payment. A Superior Offer must post a 10% deposit, while the Stalking Horse bid entirely escapes this requirement. These differences, and onerous burdens impeding any Alternative Transaction, create a substantially unfair selling process, tilted significantly in favor of the Stalking Horse bid. Moreover, an Alternative Transaction can impose no conditions which were not in the Stalking Horse bid. Read literally, this may preclude an Alternative Transaction from qualifying as a Superior Offer. The DIP order and Stalking Horse bid have essentially "rigged the game". This speaks, once again, to the closed process that favours only the Schottensteins and their inner circle.

d) GGB has Not Acted with Due Diligence

68. Consistent with the CCAA regime generally, the due diligence consideration discourages parties from sitting on their rights and ensures that creditors do not strategically manoeuver or position themselves to gain an advantage.

> *Bluberi* at para. 51 (CanLII).

69. **Application:** As set out above, in January 2020, Horvitz learned from Mr. Whitaker that GGB had been insolvent since September 2019. It was at this time that GGB should have filed for insolvency. The urgency was in September 2019, not in May 2020 on the basis of All Js (and therefore the Schottenstein family's) artificial and self-imposed DIP deadlines that purport to create urgency among self-dealing parties. GGB clearly "sat on its rights" and is now strategically manoeuvering itself to gain an advantage after being aware of its insolvent status since September 2019. One can infer that this extra time was spent drawing up the blueprints for the present transactions.

e) The Undisclosed Boich Deals are Unjust Preferences

70. The undisclosed agreements also constitute unjust preferences pursuant to section 4 of the *Assignments and Preferences Act* (the "**APA**"). Section 4(2) of the APA provides as follows:

> *Assignments and Preferences Act*, R.S.O. 1190, c. A.33 [the "***APA***"], s. 4(2)

71. Under the APA, it is necessary to prove: (1) a gift, conveyance, assignment or transfer, or delivery over; (2) an intent to give a creditor an unjust preference over creditors or over any one of them; and (3) at the time of the gift, conveyance, etc., the debtor was in insolvent circumstances or unable to pay his or her debts in full or knew that he or she was in insolvent circumstances. Where a transaction with or for a creditor provides a preference over other creditors, it shall, in and with respect to any action or proceeding, within 60 days thereafter, is brought, had or taken to impeach or set aside such transaction, be presumed, in the absence of evidence to the contrary, to be made with the intention to defeat or hinder creditors.

> *APA* s. 4(3)

72. **Application:** GGB entered into the undisclosed agreements with a pre-existing creditor, Green Ops, at a time when GGB knew of its insolvency. By entering into the undisclosed

agreements less than 60 days prior to the Initial Order and this cross-motion, GGB intended to prefer Green Ops over other creditors, triggering the presumption of an unjust preference. In addition, the Monitor is obligated pursuant to section 36.1 of the CCAA to investigate and set aside wrongful preferences during the CCAA/BIA lookback period.

f) Section 11.9 CCAA Order Appropriate

73. Section 11.9 of the CCAA has also been amended to augment financial disclosure and transparency in CCAA proceedings. Under section 11.9, the Court may, on application “by any person interested in the matter,” issue an order requiring “any interested person who is likely to be affected by an order made,” pursuant to the CCAA, to disclose any aspect of their economic interest in respect of the debtor company on any terms that the Court considers appropriate.

CCAA, s. 11.9.

74. The party’s “economic interest” would include a claim, eligible financial contract, or security interest, as well as the consideration paid for the interest.

CCAA, s. 11.9(3).

75. Before making such an order, the Court must balance the interests in determining disclosure and consider the following: (a) whether the monitor approved the proposed disclosure; (b) whether the disclosed information would enhance the prospects of a viable compromise or arrangement being made in respect of the debtor company; and (c) whether any interested person would be materially prejudiced as a result of the disclosure.

CCAA, s. 11.9(2).

76. The disclosure of economic interests is meant to preserve fairness during a restructuring by addressing informational asymmetries among the parties. This increased transparency is

intended to make insolvency proceedings more accessible and increase the likelihood of a successful restructuring plan to the benefit of all stakeholders.

> Senate, Standing Senate Committee on Banking, Trade and Commerce, *Evidence*, 42-1, No 56 (8 May 2019) (Mark Schaan), online at <https://sencanada.ca/en/Content/Sen/Committee/421/BANC/56ev-54778-e>.

77. **Application:** although the Monitor has not approved the proposed disclosure, the other two factors strongly weigh in favour of the parties set out in the Notice of Cross-Motion being ordered to disclose their economic interests in the Applicants. The information sought will establish the true circumstances of self-dealing that underpin this proceeding, and will provide the Court the opportunity to create a proper and fair process that will treat all stakeholders fairly, while maximizing value for creditors. There will be no prejudice to any of these parties, and if a section 11.9 CCA order is not made and the Applicants, All Js, the Schottensteins and Boich are permitted to continue withholding the true nature of their relationships and dealings, Horvitz and other creditors will be irrevocably prejudiced.

g) An Adjournment is Necessary to Allow Fairness and Transparency to Prevail

78. If the primary relief sought by Horvitz on this cross-motion is not granted, it would be manifestly unjust to grant the Application without allowing Horvitz the opportunity to obtain proper disclosure and to examine material witnesses under oath on the critical facts and side dealings that have not been disclosed to the Court.

79. There is no evidence of the alleged urgent circumstances dictating a need to permit the Applicants to obtain the DIP financing at this stage in the proceeding. In fact, the DIP lender, All Js, is owned and controlled by the Shottensteins, and is also the largest shareholder of the Applicants. The DIP deadlines are self-imposed by the Schottensteins and have been contrived to give the *appearance* of urgency where there is none. Clearly, there has been no urgency to act

considering that the Applicants have actually been insolvent since September 2019, and have sat on their hands until now.

80. The Initial Application was brought on only one day notice. The comeback motion was scheduled for one week after that. It would be manifestly unjust for Horvitz not to have the opportunity to prove the impact of the private side dealings, and examine those involved under oath.

h) Summary

81. Horvitz submits that the Court should not permit this abuse of the CCAA process. To do so would be to permit the Applicants to be restructured to the favour of the Schottensteins, who wish to manipulate the system to avoid and limit their own liabilities in their failed business venture. The Schottensteins seek to do so on the backs of innocent secured creditors who believed in the business model, invested, and had certain reasonable expectations to be treated fairly. Horvitz asks this Court to fashion a just outcome.

V — RELIEF REQUESTED

82. Horvitz therefore seeks an Order setting aside the Initial Order with costs, and in the alternative, a fourteen (14) day adjournment and the additional alternative relief set out in the Notice of Cross-Motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED BY,

Lou Brzezinski/Varoujan Arman/Stephen Gaudreau
BLANEY McMURTRY LLP
Lawyers for Michael D. Horvitz Revocable Trust

SCHEDULE A
LIST OF AUTHORITIES

No.	Case Name
1.	*Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 (CanLII)
2.	*Re Crystallex International Corporation*, 2012 ONCA 404 (CanLII)
3.	*Canwest Global Communications Corp. (Re)*, 2009 CarswellOnt 6184 (CanLII)
4.	*9354-9186 Québec inc. v. Callidus Capital Corp*., 2020 SCC 10 (CanLII)
5.	*Ernst & Young Inc. v. Essar Global Fund Limited*, 2017 ONCA 1014 (CanLII)
6.	*Bhasin v. Hyrnew*, 2014 SCC 71 (CanLII)
7.	*Kitchener Frame Ltd., Re*, 2012 ONSC 234 (CanLII)
8.	*Mayer, Re*, 1994 CarswellOnt 268 (CanLII)
9.	*Derochie v. Derochie*, 2003 ABQB 345 (CanLII)
10.	*Re CanaSea PetroGas Group Holdings Limited*, 2014 ONSC 6116 (CanLII).

SCHEDULE B
STATUTORY PROVISIONS RELIED UPON

***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

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.

Priority — other orders

11.2 (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

11.2 (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.

Additional factor — initial application

11.2 (5) When an application is made under subsection (1) at the same time as an initial application referred to in subsection 11.02(1) or during the period referred to in an order made under that subsection, no order shall be made under subsection (1) unless the court is also satisfied that the terms of the loan are limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

[…]

Disclosure of financial information

11.9 (1) A court may, on any application under this Act in respect of a debtor company, by any person interested in the matter and on notice to any interested person who is likely to be affected by an order made under this section, make an order requiring that person to disclose any aspect of their economic interest in respect of a debtor company, on any terms that the court considers appropriate.

Factors to be considered

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

(a) whether the monitor approved the proposed disclosure;

(b) whether the disclosed information would enhance the prospects of a viable compromise or arrangement being made in respect of the debtor company; and

(c) whether any interested person would be materially prejudiced as a result of the disclosure.

Meaning of economic interest

(3) In this section, ***economic interest*** includes

(a) a claim, an eligible financial contract, an option or a mortgage, hypothec, pledge, charge, lien or any other security interest;

(b) the consideration paid for any right or interest, including those referred to in paragraph (a); or

(c) any other prescribed right or interest

[…]

DUTY OF GOOD FAITH

Good faith

18.6 (1) Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.

Good faith — powers of court

(2) If the court is satisfied that an interested person fails to act in good faith, on application by an interested person, the court may make any order that it considers appropriate in the circumstances.

***Assignments and Preferences Act*, R.S.O. 1190, c. A.33.**

Nullity of gifts, transfers, etc., made with intent to defeat or prejudice creditors

4 (1) Subject to section 5, every gift, conveyance, assignment or transfer, delivery over or payment of goods, chattels or effects, or of bills, bonds, notes or securities, or of shares, dividends, premiums or bonus in any bank, company or corporation, or of any other property, real or personal, made by a person when insolvent or unable to pay the person's debts in full or when the person knows that he, she or it is on the eve of insolvency, with intent to defeat, hinder, delay or prejudice creditors, or any one or more of them, is void as against the creditor or creditors injured, delayed or prejudiced. R.S.O. 1990, c. A.33, s. 4 (1).

Unjust preferences

(2) Subject to section 5, every such gift, conveyance, assignment or transfer, delivery over or payment made by a person being at the time in insolvent circumstances, or unable to pay his, her or its debts in full, or knowing himself, herself or itself to be on the eve of insolvency, to or for a creditor with the intent to give such creditor an unjust preference over other creditors or over any one or more of them is void as against the creditor or creditors injured, delayed, prejudiced or postponed. R.S.O. 1990, c. A.33, s. 4 (2).

When there is presumption of intention if transaction has effect of unjust preference

(3) Subject to section 5, if such a transaction with or for a creditor has the effect of giving that creditor a preference over the other creditors of the debtor or over any one or more of them, it shall, in and with respect to any action or proceeding that, within sixty days thereafter, is brought, had or taken to impeach or set aside such transaction, be presumed, in the absence of evidence to the contrary, to have been made with the intent mentioned in subsection (2), and to be an unjust preference within the meaning of this Act whether it be made voluntarily or under pressure. R.S.O. 1990, c. A.33, s. 4 (3).

Idem

(4) Subject to section 5, if such a transaction with or for a creditor has the effect of giving that creditor a preference over the other creditors of the debtor or over any one or more of them, it shall, if the debtor within sixty days after the transaction makes an assignment for the benefit of the creditors, be presumed, in the absence of evidence to the contrary, to have been made with the intent mentioned in subsection (2), and to be an unjust preference within the meaning of this Act whether it be made voluntarily or under pressure. R.S.O. 1990, c. A.33, s. 4 (4); 1993, c. 27, Sched.