Court File No.: CV-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 APPLICANTS
(Comeback Motion)
(Returnable May 29, 2020)

May 27, 2020

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PART I - OVERVIEW

1. The Applicants are part of a corporate group (the "**GGB Group**") that is in the business of growing, processing and selling cannabis primarily in Nevada, Massachusetts and Florida. Green Growth Brands Inc. ("**GGB**") is the parent entity of the GGB Group.

2. Facing a severe liquidity crisis and the maturity of significant secured debt obligations, on May 20, 2020, the Applicants sought and obtained protection under the *Companies' Creditors Arrangement Act*[1] pursuant to the Initial Order that, among other things, granted a stay of proceedings until May 29, 2020, appointed Ernst & Young Inc. ("**EY**") as Monitor of the Applicants (the "**Monitor**"), approved limited DIP financing, and granted certain charges over the Applicants' property.

3. This factum is filed in support of a motion by the Applicants (the "**Comeback Motion**") seeking:

[1] R.S.C. 1985, c. C-36, as amended (the "**CCAA**").

(a) an Amended and Restated Initial Order providing for certain amendments to the Initial Order substantially in the form of the draft order attached as Tab 3 of the Applicants' Motion Record, including increasing the DIP Lenders' Charge to US$7.5 million to secure the full amount to be advanced under the DIP Agreement during the CCAA Proceedings; and

(b) an order (the "**SISP Order**") substantially in the form of the draft order attached as Tab 4 of the Motion Record, approving:

(i) the sale and investment solicitation process (the "**SISP**"), which is further described herein;

(ii) the Acquisition Agreement made as of May 19, 2020 (the "**Stalking Horse APA**") between GGB, All Js Greenspace LLC ("**All Js**") and Capital Transfer Agency, ULC ("**CTA**"); and

(iii) the Break Fee and Expense Reimbursement (as those terms are defined below).

PART II - THE FACTS

4. The facts with respect to this motion are more fully set out in the Affidavit of Raymond C. Whitaker III sworn May 19, 2020 (the "**Initial Affidavit**") and the Affidavit of Raymond C. Whitaker III sworn May 26, 2020 (the "**Comeback Affidavit**"). Capitalized terms used herein but not otherwise defined have the meaning ascribed to them in the Comeback Affidavit.

5. All references to currency in this factum are references to Canadian dollars, unless otherwise indicated.

A. BACKGROUND

6. The GGB Group is in the business of creating and retailing cannabis-derived consumer goods. The GGB Group historically operated two business segments: the MSO Business, which cultivates, processes, brands and sells THC-based cannabis products; and the CBD Business, which produces and sells CBD-infused consumer products.

Comeback Affidavit, para 7, Applicants' Motion Record, Tab 2.

7. As set out in greater detail in the Initial Affidavit, the Applicants were facing a severe liquidity crisis and the maturity of significant secured debt obligations, causing them to seek CCAA protection on May 20, 2020, pursuant to the Initial Order. Consistent with s. 11.001 of the CCAA, the Initial Order only provided for relief that was reasonably necessary for the continued operations of the Applicants until the Comeback Hearing, including: (a) a stay of proceedings until May 29, 2020, (b) approval of the DIP Agreement with a limit of US$1 million in borrowings, and (c) approval of the Administration Charge in the amount of $1 million, the Directors' Charge in the amount of $25,000, and the DIP Lender's Charge, in the maximum amount of US$1 million.

Comeback Affidavit, para 6, Applicants' Motion Record, Tab 2.

B. STATUS OF THE CCAA PROCEEDINGS

8. Since the granting of the Initial Order on May 20, 2020, the Applicants have been working diligently to maintain the stability of their business operations and prepare to commence the SISP. The Applicants' activities, with the assistance of the Monitor, since the date of the Initial Order have included: (a) responding to inquiries from and engaging with parties that have expressed an interest in participating in the SISP, (b) preparing the form of notice of the SISP to be published in the Globe and Mail and other publications, and the

press release announcing the commencement of the CCAA Proceedings and the SISP, (c) preparing the form of NDA to be signed by parties interested in participating in the SISP, and (d) preparing a Confidential Information Memorandum and a virtual data room to be provided to Qualified Bidders during the SISP.

Comeback Affidavit, para 10, Applicants' Motion Record, Tab 2.

C. THE STALKING HORSE APA AND THE SISP

9. As described in the Initial Affidavit, the Applicants plan to use the CCAA Proceedings to implement a SISP to sell the MSO Business for the benefit of their creditors and other stakeholders.

Comeback Affidavit, para 8, Applicants' Motion Record, Tab 2.

10. With this objective in mind, on May 19, 2020, GGB entered into the Stalking Horse APA with All Js, the Applicants' DIP Lender, and CTA, on behalf of the Applicants' debentureholders, acting jointly as the stalking horse bidders (the "**Purchaser**").

Comeback Affidavit, para 12, Applicants' Motion Record, Tab 2.

11. Pursuant to the Stalking Horse APA, the Purchaser agreed to purchase (a) 100% of the equity in GGB Canada and Xanthic Biopharma, (b) all intercompany indebtedness owed to GGB by GGB's direct subsidiaries, other than Green Growth Brands Realty, Green Growth Brands, LLC and its subsidiaries, and any entities subject to the Florida sale (the "**GGB Acquired Entities**"), (c) the books and records and business information of GGB, (d) any contracts of GGB designated by the Purchaser in writing prior to the Closing Date (the "**Designated Contracts**"), (e) the intellectual property of GGB, and (f) the cash held by GGB and the GGB Acquired Entities (the "**Purchased Assets**"). The Purchaser also agreed to become responsible for the Assumed Liabilities at Closing.

Comeback Affidavit, para 13, Applicants' Motion Record, Tab 2.

12. The aggregate purchase price payable by the Purchaser to the Seller in the Stalking Horse APA is the total of (a) the Credit Bid Amount, being the aggregate amount owing under the DIP Agreement, the May Debentures, the Backstop Debentures, the Backstop Security Agreement, the All Js Secured Notes and all other agreements executed as security for the payment of GGB's performance thereunder, and all advances secured by the DIP Lender's Charge (collectively, the "**Senior Secured Claims Amount**"), (b) the professional fees secured by the Administration Charge, and (c) the Assumed Liabilities. The Company estimates that the Purchase Price amounts to approximately US$105.8 million, assuming the Florida Sale closes, subject to the accrued and unpaid interest, recoverable fees and, in the case of the GAOC Note, applying an agreed exchange rate.

Comeback Affidavit, para 13, Applicants' Motion Record, Tab 2.

13. It is a condition to the closing of the transaction contemplated by the Stalking Horse APA that the SISP Order provide for a Court-ordered charge ranking after the DIP Lender's Charge securing the Break Fee and Expense Reimbursement (the "**Bid Protections Charge**").

Comeback Affidavit, para 13, Applicants' Motion Record, Tab 2.

14. In addition to the approval of the Stalking Horse APA, the Applicants are also seeking approval of the SISP. The SISP contemplates a two-phase process to solicit superior offers for the Purchased Assets. During Phase I, the Monitor will solicit non-binding letters of interest from prospective strategic or financial parties to acquire the Property or to invest in the Applicants. During Phase II, each Qualified Bidder that is not eliminated from the SISP in accordance with the SISP Procedures will have the chance to submit a Qualified Purchase Bid (to acquire all or substantially all of the Property) or a Qualified Investment Bid (to make

an investment in the Applicants) to the Monitor. The key dates of the SISP are set out in the Comeback Affidavit; it is contemplated that the closing of the Successful Bid will occur 90 days after the date the SISP Order is issued.

> Comeback Affidavit, paras 15-19, Applicants' Motion Record, Tab 2.

PART III - ISSUES

15. The issues before this Court, as addressed below, are whether:

    (a) the Stalking Horse APA and the Bid Protections contemplated therein should be approved;

    (b) the SISP should be approved;

    (c) the restructuring-related provisions in the Amended and Restated Initial Order should be granted;

    (d) the amount of the DIP Lender's Charge should be increased; and

    (e) the Stay Period should be extended to August 15, 2020.

PART IV - THE LAW

A. THE STALKING HORSE APA SHOULD BE APPROVED

16. 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 or arrangement.

> *Nortel Networks Corp (Re)*, 2009 CanLII 39492 (ONSC) at para 48 (CanLII) [***Nortel***].
>
> CCAA, s. 11 and 36

17. Stalking horse agreements facilitate sales by establishing a baseline price and deal structure for superior bids from interested parties, maximizing the value of a business for the benefit of its stakeholders and enhancing 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 (CanLII) [***Danier***].
>
> *CCM Master Qualified Fund v blutip Power Technologies*, 2012 ONSC 1750 at para 7 (CanLII) [***CCM***].
>
> *Nortel* at para 56 (CanLII).
>
> *Re Aralez Pharmaceuticals Inc et al.* (October 10, 2018) Toronto, CV-18-603054-00CL (Ont Sup Ct [Comm List]), Order re: Bidding Procedures Approval at para 6 (Monitor's website).
>
> *Re Clover Leaf Holdings Company et al.* (December 20, 2019) Toronto, CV-19-631523-00CL (Ont Sup Ct [Comm List]), Order re: Bidding Procedures, Stalking Horse Approval and Stay Extension at para 6 (Monitor's website).

18. In the present case, the Stalking Horse APA is the product of extensive negotiations between GGB and the Purchaser and provides a purchase price that establishes a valuable baseline price that is intended to improve the bids received in the SISP. The purchase price under the Stalking Horse APA is a credit bid, which the Company estimates amounts to approximately US$105.8 million assuming the Florida Sale closes, subject to the accrued and unpaid interest, recoverable fees and, in the case of the GAOC Note, applying an agreed exchange rate. This baseline price will assist in maximizing the value of the Applicants' business and obtaining the highest and best bids for the Applicants' business.

> Comeback Affidavit, para 13, Applicants' Motion Record, Tab 2.

19. The Stalking Horse APA provides for bid protections in the form of the Break Fee and the Expense Reimbursement (collectively, the "**Bid Protections**") in the total amount of

US$2,150,000, representing approximately 1.9% of the Purchase Price set out in the Stalking Horse APA. These fees are proposed to be secured by a Bid Protections Charge against the Property, ranking subordinate to the DIP Lender's Charge.

Comeback Affidavit, paras 13-14, Applicants' Motion Record, Tab 2.

20. Break fees and expense reimbursements payments have been approved by the Court numerous times in connection with stalking horse agreements. These fees compensate stalking horse purchasers 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 expenses that may be expected. Courts recognize that such payments vary by case, but may justifiably reach up to 5% of the expected transaction value.

Danier at paras 41-42 (CanLII).

CCM at para 13 (CanLII).

21. It has also been recognized that agreeing to bid protections and any consequent charges are matters of business judgement, and that judicial deference to the carefully considered business decisions of the debtor is appropriate if the decision falls within a range of reasonableness.

Brainhunter Inc (Re), 2009 CanLII 72333 (ONSC) at para 20 (CanLII);

BCE Inc v 1976 Debentureholders, 2008 SCC 69 at para 40 (CanLII).

22. In this case, the Bid Protections and the Bid Protections Charge were the subject of arm's length negotiations, are well within the range of such protections previously accepted by this Court, and are reasonable in light of the significant value provided by the Stalking

Horse APA. The Bid Protections and the Bid Protections Charge were a necessary component for the Purchaser to agree to the Stalking Horse APA.

Comeback Affidavit, para 13, Applicants' Motion Record, Tab 2.

23. The Monitor has opined that the Bid Protections and the Bid Protections Charge are reasonable.

First Report of the Monitor dated May 26, 2020 (the "**First Report**"), para 63.

24. Based on the foregoing, the Applicants believe that the Stalking Horse APA, including the Bid Protections and the Bid Protections Charge, are fair and reasonable in the circumstances and should be approved.

B. THE SISP SHOULD BE APPROVED

25. In *Nortel*, the Court identified several factors to be considered in determining whether to approve a sale 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 (CanLII).

Danier at para 23 (CanLII).

US Steel Canada Inc. (Re), 2015 ONSC 2523 at para 3 (Monitor's website) [***US Steel***].

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

> **Factors to be considered**
>
> **36 (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.
>
> CCAA, s. 36(3).
>
> *US Steel* at para 8 (Monitor's website).

27. In these circumstances, the SISP provides an appropriate framework to obtain the best offer for the Applicants' assets and business. Considering the *Nortel* criteria and applicable factors set out in s. 36(3) of the CCAA, the SISP should be approved as:

(a) **A sale transaction is warranted at this time**: The Applicants are insolvent, unable to indefinitely continue operations in their current state, and must restructure to preserve their business. A sale will maximize value for the

Applicants' stakeholders and allow the business to continue as a going concern in the best interests of all stakeholders;

(b) **A sale will benefit the whole economic community**: The Stalking Horse APA sets the floor for other sale transactions and may contribute to a higher valuation for the Applicants' assets, thereby increasing the sale proceedings and optimizing distributions to creditors;

(c) **There is no better viable alternative**: The Applicants carefully considered the Stalking Horse APA and the SISP, and concluded that the SISP, with the stability provided by the Stalking Horse APA, represented the best option in the circumstances;

(d) **The Monitor's involvement**: The Monitor was involved in the negotiations that led to the SISP, and has opined that the SISP provides a fair and transparent marketing process that should allow the Applicants to maximize realizations by seeking higher or otherwise better offers for the Property**.** The Monitor is also of the view that the SISP and the requested priority charges are fair and reasonable in the circumstances; and

(e) **The consideration received is fair and reasonable**: The Stalking Horse APA and the SISP were negotiated with the majority of the Applicants' secured creditors. Together, the Stalking Horse APA and the SISP establishes a floor price and a process to solicit better offers, thereby ensuring a fair value for the Applicants' assets.

Comeback Affidavit, para 20, Applicants' Motion Record, Tab 2.

First Report at para 63.

28. For the reasons above, the Applicants are of the view that the SISP represents the best option under the circumstances to maximize value for the Applicants' stakeholders.

C. THE RESTRUCTURING-RELATED PROVISIONS IN THE AMENDED AND RESTATE INITIAL ORDER SHOULD BE GRANTED

29. In compliance with s. 11.001 of the CCAA, the relief sought by the Applicants in the Initial Order was limited to what was reasonably necessary for the initial ten-day stay period. The Applicants are now seeking to expand the relief granted by the Initial Order so that it more closely aligns with the Model Initial Order.

> Comeback Affidavit, para 21, Applicants' Motion Record, Tab 2.
>
> Proposed Amended and Restated Initial Order, Applicants' Motion Record, Tab 3.

30. The proposed restructuring and Monitor-related provisions being requested are largely identical to provisions found in the Model Initial Order.

> Comeback Affidavit, para 21, Applicants' Motion Record, Tab 2.

31. In recent CCAA proceedings, this Court has inserted restructuring- and Monitor-related provisions from the Model Initial Order into amended and restated initial orders granted as part of a CCAA comeback hearing. This has recently occurred in *Re Lydian International Limited (Re)*.

> *Lydian International Limited (Re)*, 2019 ONSC 473 at para 4 (Monitor's website).

32. The Applicants submit that the insertion of the restructuring-related provisions in the Amended and Restated Initial Order is necessary in the circumstances as it will enable the Applicants and the Monitor to take certain steps that may become necessary during the CCAA Proceedings with a view to maximizing stakeholder value, including exploring potential sale and refinancing options.

D. THE DIP LENDER'S CHARGE SHOULD BE INCREASED

33. Pursuant to the Initial Order, the DIP Lender's Charge was capped at US$1 million. This amount was obtained in consideration of s. 11.001 and 11.2(5) of the CCAA, as the limited amounts reasonably necessary for the continued operations of the Applicants in the ordinary course of business for the initial ten-day stay period. The Applicants now seek to have the amount of the DIP Lender's Charge increased to US$7.5 million, being the entirety of the amount available under the DIP Agreement, plus potential fees and interest.

> Comeback Affidavit, paras 22-23, Applicants' Motion Record, Tab 2.

34. As was submitted in the Applicants' factum in connection with the Initial Order, this Court has the jurisdiction to authorize and secure funding in the context of a CCAA restructuring pursuant to s. 11.2(1) and 11.2(2) of the CCAA. In considering whether to approve DIP financing, the Court is to consider the non-exhaustive list of factors set out in s. 11.2(4) of the CCAA.

> CCAA, s. 11.2(1), (2) and (4).

35. These same provisions of the CCAA provide this Court with the authority to increase the amount secured by a DIP charge.

> See e.g. *Re James E Wagner Cultivation Corporation et al.* (9 April 2020), Toronto CV-20-00639000-00CL (Ont Sup Ct [Comm List]), Endorsement re: Amended and Restated Initial Order (handwritten) at para 15 (Monitor's website).

36. The criteria supporting the approval of the DIP Agreement and the DIP Lender's Charge in the Initial Order are still present. The Applicants require the funding to be provided through advances under the DIP Agreement in order to continue operating as a going concern and preserve enterprise value while the SISP is carried out. At this time, the Applicants are merely seeking to increase the quantum of the DIP Lender's Charge to a

maximum of US$7.5 million. Additional draws under the DIP Agreement are conditional on the increase to the DIP Lender's Charge being granted.

Comeback Affidavit, para 23, Applicants' Motion Record, Tab 2.

37. In accordance with subsection 11.2(1) of the CCAA, notice of the increase to the DIP Lender's Charge has been provided to the Applicants' secured creditors. The proposed DIP Lender's Charge will not secure obligations incurred prior to the CCAA proceedings.

Proposed Amended and Restated Initial Order, Applicants' Motion Record, Tab 3.

38. Accordingly, the requested relief in respect of the DIP Lender's Charge is reasonably necessary and appropriate in the circumstances.

E. THE STAY PERIOD SHOULD BE EXTENDED

39. The Stay Period expires on May 29, 2020. Pursuant to s. 11.02 of the CCAA, the Court may grant an extension of a stay of proceedings where: (a) circumstances exist that make the order appropriate; and (b) the debtor company satisfies the Court that it has acted, and is acting, in good faith and with due diligence.

CCAA, s. 11.02(2) and (3).

40. The Applicants are seeking to extend the Stay Period to and including August 15, 2020. This will provide the Applicants with stability and allow them to implement the SISP and maximize recoveries for their stakeholders.

Comeback Affidavit, para 25, Applicants' Motion Record, Tab 2.

41. No creditors are expected to suffer material prejudice as a result of the extension of the Stay Period. The Applicants are acting in good faith and with due diligence in pursuing

their restructuring strategy and will continue to do so during the proposed extension of the Stay Period through to August 15, 2020.

Comeback Affidavit, paras 24-25 and 27, Applicants' Motion Record, Tab 2.

42. Subject to this Court approving the increase to the DIP Lender's Charge, the Applicants will have access to sufficient liquidity to continue current operations during the extension of the Stay Period.

Comeback Affidavit, para 28, Applicants' Motion Record, Tab 2.

43. The Monitor supports extending the Stay Period until August 15, 2020.

First Report of the Monitor, para 30.

44. For the reasons described above, the Stay Period should be extended to August 15, 2020.

PART V - ORDER SOUGHT

45. For the foregoing reasons, the Applicants respectfully request that this Court grant the Amended and Restated Initial Order substantially in the form of the draft order attached at Tab 3 to the Applicants' motion record, and the SISP Order substantially in the form of the draft order attached at Tab 4 to the Applicants' motion record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 27th day of May, 2020.

Stikeman Elliott

Stikeman Elliott LLP
Lawyers for the Applicants

SCHEDULE "A"
LIST OF AUTHORITIES

Cases

1. *Nortel Networks Corp (Re)*, 2009 CanLII 39492 (ON SC) (CanLII)

2. *Danier Leather Inc., Re*, 2016 ONSC 1044 (CanLII)

3. *CCM Master Qualified Fund v blutip Power Technologies*, 2012 ONSC 1750 (CanLII)

4. *Aralez Pharmaceuticals Inc et al.* (October 10, 2018) Toronto, CV-18-603054-00CL (Ont Sup Ct [Comm List]), Order re: Bidding Procedures Approval (Monitor's website)

5. *Re Clover Leaf Holdings Company et al.* (December 20, 2019) Toronto, CV-19-631523-00CL (Ont Sup Ct [Comm List]), Order re: Bidding Procedures, Stalking Horse Approval and Stay Extension (Monitor's website)

6. *Brainhunter Inc (Re)*, 2009 CanLII 72333 (ON SC) (CanLII)

7. *BCE Inc v 1976 Debentureholders*, 2008 SCC 69 (CanLII)

8. *US Steel Canada Inc. (Re)*, 2015 ONSC 2523 (Monitor's website)

9. *Lydian International Limited (Re)*, 2019 ONSC 473 (Monitor's website)

10. *Re James E Wagner Cultivation Corporation et al.* (9 April 2020), Toronto CV-20-00639000-00CL (Ont Sup Ct [Comm List]), Endorsement re: Amended and Restated Initial Order (Monitor's website)

SCHEDULE "B"
RELEVANT STATUTES

***Companies' Creditors Arrangement Act*, RSC 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.

Relief reasonably necessary

11.001 An order made under section 11 at the same time as an order made under subsection 11.02(1) or during the period referred to in an order made under that subsection with respect to an initial application shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

[…]

Stays, etc. — initial application

11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 10 days,

> (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act;
>
> (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.

Stays, etc. — other than initial application

11.02 (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.

[...]

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.

[…]

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

36 (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

36 (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.

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Proceeding commenced at Toronto

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(Comeback Motion)

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