Court File No.: ____________________

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 PERASO TECHNOLOGIES INC.

Applicant

FACTUM OF THE APPLICANT
(CCAA Initial Application)
(Returnable June 3, 2020)

June 3, 2020

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Court File No.: ____________________

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

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PART I - OVERVIEW

1. Peraso Technologies Inc. ("**Peraso**" or the "**Applicant**") seeks creditor protection and certain other ancillary relief pursuant to an order (the "**Initial Order**") under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"), substantially in the form of the draft order attached to the Application Record at Tab 3.

2. Peraso is in the business of the development, marketing and sale of the technologies that will power the next generation of wireless internet. Specifically, Peraso's software and chipsets are designed to operate on the 60 gigahertz ("**GHz**") band and, it is anticipated, the 5G wireless network.

3. Peraso is insolvent. Without CCAA protection, Peraso is anticipated to run out of cash by end of June 2020, at which point it will be forced to completely cease operations. Peraso's liquidity crisis is due to, *inter alia,* protracted disputes and multi-jurisdictional litigation commenced by Ubiquiti Inc. and its various affiliates (collectively, "**Ubiquiti**"), which have stymied any and all of Peraso's efforts to raise additional funds, pursue a sales process or even market its products outside of formal insolvency proceedings.

4. Peraso requires the protection of the CCAA and the relief available thereunder so that it can resolve its disputes with Ubiquiti, which will enable it to explore options, including restructuring, financing, sales to other customers and/or the sale of the entire business, and emerge from these proceedings as a viable and sustainable business for the benefit of all of its stakeholders, including its employees and shareholders.

5. If the proposed Initial Order is granted, Peraso intends to apply for recognition of these proceedings in the United States pursuant to Chapter 15 of the United States Bankruptcy Code, 11 U.S. Code § 1501-1532 (the "**Bankruptcy Code**").

PART II - THE FACTS

6. The facts with respect to this application are briefly summarized below and more fully set out in the Affidavit of Ronald Glibbery sworn June 2, 2020 in support of this CCAA filing (the "**Glibbery Affidavit**").

7. Capitalized terms used herein but not otherwise defined have the meanings ascribed to them in the Glibbery Affidavit. All references to currency in this factum are to US dollars, unless otherwise noted.

A. THE APPLICANT'S BUSINESS

8. The Applicant is a corporation incorporated under the laws of the Province of Ontario in 2008, with a registered head office in Toronto. The Applicant does not have any subsidiary corporations.

Glibbery Affidavit at paras 1 and 12, Application Record, Tab 2.

9. Peraso is a fabless[1] semiconductor[2] company specializing in the development of integrated circuits and chipsets[3] for use in wireless technology operating on the 60 GHz band. The resulting wireless technology is readily used for a range of services, including high speed wireless networks and high-speed broadband without the need for fibre or cable connections.

Glibbery Affidavit at para 11, Application Record, Tab 2.

10. As of May 19, Peraso's workforce includes 78 employees and contractors.

Glibbery Affidavit at para 20, Application Record, Tab 2.

i. Peraso's Relationship with Ubiquiti

11. Ubiquiti is Peraso's largest customer, representing approximately 95% of Peraso's component revenue and at least 40% of Peraso's overall revenue. Ubiquiti Canada, a subsidiary of Ubiquiti, holds approximately 4.43% of Peraso's outstanding common shares.

Glibbery Affidavit at paras 14 and 24, Application Record, Tab 2.

12. Ubiquiti's relationship with Peraso can be traced back to December 21, 2018 when Peraso and Ubiquiti entered into the Peraso-Ubiquiti Transaction. Pursuant to the Peraso-Ubiquiti Transaction, Peraso agreed to develop certain chipsets as per Ubiquiti's specifications, and in exchange Ubiquiti would subscribe for Class C Shares in Peraso upon the achievement of the First, Second, and Third Development Milestones.

Glibbery Affidavit at paras 28-29, Application Record, Tab 2.

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[1] "Fabless" means that the fabrication of silicon wafers (or chips) used in Peraso's products is outsourced to a plant or foundry.

[2] A semiconductor is a material product usually comprised of silicon, which conducts electricity more than an insulator, such as glass, but less than a pure conductor, such as copper or aluminum. Nearly any device that is computerized or that uses radio waves depends on semiconductors to function.

[3] A chipset is a set of electronic components which consists of at least one radio device, one baseband device, and, typically, an antenna.

13. Pursuant to the Licence Agreement entered into as part of the Peraso-Ubiquiti Transaction, Peraso agreed to the Exclusivity Clause. The effect of the Exclusivity Clause is that it prevents Peraso from selling certain chipsets to customers other than Ubiquiti, thereby restricting Peraso's revenue-generating opportunities, limiting Peraso's ability to monetize its business through additional customers, and discouraging acquisition and sale. Without the Exclusivity Clause, Peraso would have many alternative customers who would purchase the chipsets covered by the Licence Agreement.

Glibbery Affidavit at paras 25 and 29, Application Record, Tab 2.

14. The Peraso-Ubiquiti Transaction was designed to provide Peraso—which, at the time, was a technology company in its early stages—with a predictable flow of capital. Peraso depended on this flow of capital to fund its operations and to remain solvent.

Glibbery Affidavit at para 31, Application Record, Tab 2.

B. FINANCIAL CHALLENGES AND RESPONSES

i. Ubiquiti's Failure to Invest in Peraso

15. On January 29, 2019, Peraso met the Second Tranche Development Milestone and gave proper notice to Ubiquiti as per the Licence Agreement. This triggered a payment obligation under which Ubiquiti was obligated to cause Ubiquiti Canada to purchase $2 million of Peraso's Class C Shares. Ubiquiti and Ubiquiti Canada did not make the required $2 million investment and did not provide written notice of rejection or acceptance of the Second Tranche Development Milestone, in breach of the Licence Agreement.

Glibbery Affidavit at paras 34-35, Application Record, Tab 2.

16. On October 31, 2019, Peraso gave proper notice of satisfaction that it achieved the Third Tranche Development Milestone. This triggered a payment obligation under which

Ubiquiti was obligated to cause Ubiquiti Canada to purchase $8 million of Peraso's Class C Shares. Again, Ubiquiti and Ubiquiti Canada did not make the required $8 million investment. Again, Ubiquiti failed to provide written notice of rejection or acceptance of the Third Tranche Development Milestone in breach of the Licence Agreement.

Glibbery Affidavit at paras 37-38, Application Record, Tab 2.

ii. Need for Emergency Funding

17. In late 2019, it became apparent that Ubiquiti was withholding its $10 million investment in Peraso in an attempt to hold the financial stability of Peraso hostage in exchange for acquiring the intellectual property rights owned by Peraso under the Licence Agreement. Accordingly, and to avoid insolvency, Peraso sought and obtained critical funding in the form of the 2019 Notes.

Glibbery Affidavit at paras 42-43, Application Record, Tab 2.

18. On January 16, 2020, Peraso terminated the Licence Agreement, as it was entitled to do under its terms.

Glibbery Affidavit at para 45, Application Record, Tab 2.

19. In February 2020, Peraso attempt to remedy its financial situation by entering into an exclusivity agreement with a potential third party purchaser. Days after being notified of this occurrence, Ubiquiti filed the Licence Litigation in the SDNY Court seeking, among other things, a declaratory judgement that the Licence Agreement remained in full force and effect and compensatory damages of approximately $5 million. Shortly thereafter, the potential third party purchaser informed Peraso that it would not move forward with the proposed acquisition of Peraso without the Licence Litigation first being resolved.

Glibbery Affidavit at paras 46-47, Application Record, Tab 2.

20. While Peraso disputes the allegations in the Licence Litigation, the proceedings commenced by Ubiquiti have embroiled Peraso in a protracted dispute that has strained its resources and precluded it from fully operating or monetizing its business. Viable financiers for the Applicant are deterred by the ongoing litigation, which shrouds any acquisition or investment in Peraso in significant risk.

Glibbery Affidavit at paras 77-84, Application Record, Tab 2.

21. To temporarily address its liquidity concerns, Peraso obtained urgent financing in the form of the 2020 Notes in the aggregate amount of approximately $3.9 million. Ubiquiti did not participate in the 2020 Notes offering and instead, on April 8, 2020, commenced the Oppression Litigation which, among other things, alleged that the steps taken by Peraso to obtain the 2020 Notes amounted to oppression. The Oppression Litigation is in addition to the Licence Litigation and the Notice Litigation.

Glibbery Affidavit at paras 60 and 71 Application Record, Tab 2.

22. While the issuance of the 2020 Notes provided Peraso with crucial funding, it did not resolve the on-going Licence Litigation, and unlike Ubiquiti, Peraso lacks the means to continue the Licence Litigation and Oppression Litigation (and any other claims Ubiquiti may choose to assert against Peraso). The 2020 Notes only provided Peraso with enough liquidity to survive until approximately late June 2020.

Glibbery Affidavit at para 78, Application Record, Tab 2.

iii. The Applicant is at Imminent Risk of Insolvency

23. Peraso needs additional financing if it is to continue operating past June 2020. Peraso has been unable to obtain financing or consummate any other viable transactions due to, among other things, the Licence Litigation and the Oppression Litigation. Similarly, Peraso

has been unable to commence meaningful discussions with potential acquirors on account of the Licence Litigation.

Glibbery Affidavit at para 78, Application Record, Tab 2.

24. The Applicant is seeking CCAA protection to afford it the necessary time to resolve the litigation commenced by Ubiquiti. Once resolved, Peraso anticipates greater access to financing and/or purchasing opportunities.

Glibbery Affidavit at para 86, Application Record, Tab 2.

25. Absent the granting of the Initial Order, the Applicant will certainly exhaust its resources in the very near future and, without the protections sought herein, will be unable to continue its operations to the immense detriment of its employees, shareholders and other stakeholders.

Glibbery Affidavit at para 87, Application Record, Tab 2.

PART III - THE ISSUES

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

(a) the Applicant meets the criteria for, and should be granted, protection under the CCAA;

(b) the proposed monitor, Ernst & Young Inc. ("**EY**"), should be appointed as the monitor in these proceedings (in such capacity, the "**Monitor**");

(c) the Court should exercise its discretion to grant the Administration Charge and the Directors' Charge; and

(d) the proposed Monitor should be authorized and empowered to act as foreign representative.

PART IV - THE LAW

A. THIS COURT SHOULD GRANT PROTECTION TO THE APPLICANT UNDER THE CCAA

i. The Applicant is a "Debtor Company" to which the CCAA applies

27. The CCAA applies to a "debtor company" whose liabilities exceed C$5 million. A "debtor company" is defined, *inter alia*, as a "company" that is "insolvent" or that has committed an act of bankruptcy within the meaning of the *Bankruptcy and Insolvency Act*.[4]

CCAA at s. 2(1) "debtor company" and 3(1).

a) The Applicant is a "Company"

28. The CCAA defines "company" to include, amongst other things, "any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province".

CCAA s. 2(1), "company".

29. The Applicant is a corporation incorporated under the laws of the Province of Ontario and, as such, meets the CCAA definition of "company" and is therefore eligible for CCAA protection.

Glibbery Affidavit at para 12, Application Record, Tab 2.

b) The Applicant is a "Debtor Company" under the CCAA

30. The CCAA defines a "debtor company" as, *inter alia*, a company that is "insolvent".

CCAA s. 2(1) "debtor company", "company" and CCAA s. 3(1).

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[4] RSC 1985, c. B-3 [**BIA**].

31. Although the CCAA does not define the term "insolvent", it is well-established that in a CCAA application this term can be interpreted by reference to "insolvent person" in s. 2(1) of the BIA. The definition of "insolvent person" in the BIA is:

> […] a person who is not bankrupt and who resides, carries on business or has property in Canada, and whose liability to creditors provable as claims under this Act amount to one thousand dollars,
>
> and
>
> (a) who is for any reason unable to meet his obligations as they generally become due,
>
> (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
>
> (c) the aggregate of whose property is not, at a fair valuation, sufficient, or if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.
>
> *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [**BIA**] at s. 2(1), "insolvent person".
>
> *Stelco Inc, Re*, 2004 CanLII 24933 (Ont. S.C.J. [Comm. List]) [***Stelco***], paras 21-22 (CanLII).

32. In *Stelco*, Justice Farley applied an expanded definition of insolvent in the CCAA context to reflect the "rescue" emphasis of the CCAA, modifying part (a) of the BIA's definition of "insolvent person" to include a financially troubled corporation that is "reasonably expected to run out of liquidity within a reasonable proximity of time as compared with the time reasonably required to implement a restructuring".

> *Stelco* at paras 25-26 (CanLII).

33. The tests for insolvency under the BIA and the expanded definition under *Stelco* are disjunctive, and the satisfaction of either will meet the definition of insolvency in the CCAA context.

Stelco at paras 26 and 28 (CanLII).

34. The Applicant is insolvent within the meaning of the expanded definition set out in *Stelco*. In particular, the Applicant is not generating sufficient cash flow sustain its operations. The Applicant anticipates that it will have exhausted all of its cash by late June 2020. Further, the Applicant is unable to satisfy its payment obligations as they come due without additional financing. The Applicant is in a precarious position whereby the substantive reasons for its financial difficulties and liquidity issues – those being, *inter alia*, the Licence Litigation with Ubiquiti – concurrently shutter its ability to procure any further financing or to affect a sale outside of a formal court process.

Glibbery Affidavit at paras 84 and 87, Application Record, Tab 2.

Pre-filing Report of the Proposed Monitor dated June 2, 2020 (the "**Monitor's Report**") at paras 24-26.

ii. The Applicant has over C$5 million in liabilities

35. The Applicant's current outstanding liabilities are in excess of $6.9 million, which primarily consists of secured indebtedness under the 2019 Notes and the 2020 Notes. As such, the Applicant's debt exceeds the C$5 million threshold for protection under the CCAA.

Glibbery Affidavit at paras 71 and 75, Application Record, Tab 2.

36. For all of the foregoing reasons, the Applicant is a debtor company to which the CCAA applies. The Applicant is therefore eligible for protection under the CCAA.

iii. An Order Granting a Stay of Proceedings is Appropriate

37. Pursuant to section 11.02(1) of the CCAA, a Court may make an order staying all proceedings in respect of a debtor company for a period of not more than ten days, provided that the Court is satisfied that circumstances exist to make the order appropriate.

CCAA s. 11.02.

38. Exercising discretionary authority to grant a stay pursuant to the CCAA must be informed by the purpose behind the CCAA, which should be broadly and liberally interpreted. The purpose of the CCAA is to, amongst other things, maintain the *status quo* for the debtor company for a period while it consults with its stakeholders with a view to continuing operations for the benefit of both the debtor company and its creditors. The exercise of that power is appropriate in the present case.

Stelco at paras 15- 17 (CanLII).

Ted Leroy Trucking [Century Services] Ltd, Re, 2010 SCC 60 at para 60 (CanLII).

Canwest Global Communications Corp., 2011 ONSC 2215 at paras 22-25 (CanLII).

39. In *Re Nortel Networks,* Justice Morawetz held that the CCAA is intended to be flexible and must be given a broad and liberal interpretation to achieve its objectives and that a sale by the debtor which preserves its business as a going concern is consistent with those objectives.

Nortel Networks Corp. (Re), 2009 CanLII 39492 (Ont. S.C.J.) [Comm. List]) [***Re Nortel Networks***] at para 47 (CanLII).

40. It is just and appropriate for this Court to grant a stay of proceedings in respect of the Applicant, which has acted with due diligence and in good faith. The Applicant requires a stay of proceedings in order to have the breathing room it needs to stabilize its liquidity concerns in the midst of protracted litigation and establish a viable path towards resolution of that litigation and, ultimately, solvency. In the absence of CCAA protection, the Applicant may face enforcement actions by its creditors, including its noteholders, the litigation plaintiffs, and others. It would be detrimental to Peraso's business and stakeholders if any

further proceedings were commenced or continued or rights and remedies were executed against them.

Glibbery Affidavit at paras 8 and 86, Application Record, Tab 2.

41. Consistent with the language of the Model Order and existing jurisprudence, the Initial Order provides for a stay of proceedings as against Peraso's current and former directors. The stay against both the current and former directors is crucial given that the Licence Litigation and the Oppression Litigation specifically name both current and former directors as defendants.

Initial Order at para 15, Application Record, Tab 3.

Glibbery Affidavit at para 107, Application Record, Tab 2.

See e.g. *Great Basin Gold Ltd. (Re)*, 2015 BCSC 1199 at para 32 (CanLII)

42. The holders of the 2019 Notes and 2020 Notes have been given notice of this application.

Glibbery Affidavit at para 10, Application Record, Tab 2.

B. EY SHOULD BE APPOINTED AS MONITOR

43. Upon the granting of an Initial Order, s. 11.7 of the CCAA requires that at the same time the Court appoint a person to monitor the business and financial affairs of the company. EY is a trustee within the meaning of s. 2(1) of the BIA and is not subject to any of the restrictions as to who may be appointed as monitor as per s. 11.7(2) of the CCAA. EY has a significant amount of experience acting as a court-appointed Monitor in CCAA proceedings. EY has consented to acting as the Monitor in these CCAA proceedings and should be appointed.

CCAA at s. 11.7(1) and (2).

BIA at s. 2, "trustee".

Glibbery Affidavit at paras 94-95, Application Record, Tab 2.

Monitor's Report at para 62.

C. THE PRIORITY CHARGES SHOULD BE GRANTED

i. The Administrative Charge

44. The Applicant is seeking a first-ranking charge on its assets, property and undertakings (the "**Property**") in the maximum amount of C$200,000 to secure the fees and disbursements incurred in connection with services rendered to Peraso both before and after the commencement of the CCAA Proceedings by EY as the proposed Monitor, counsel to the Monitor, US counsel to the Monitor and Canadian and US counsel to Peraso (the "**Administration Charge**").

Glibbery Affidavit at paras 97-99, Application Record, Tab 2.

45. In an effort to comply with the new s. 11.001 of the CCAA, the requested Administration Charge is limited to what is reasonably necessary for the continued operation of the Applicant during the initial stay period. The Applicant may revisit the quantum of the Administration Charge as part of an amended and restated initial order at a later comeback hearing.

Glibbery Affidavit at para 96, Application Record, Tab 2.

46. The Applicant has worked with the proposed Monitor to estimate the proposed quantum of the Administration Charge. The proposed Monitor has reviewed the quantum of the Administration Charge and believes it is reasonable and appropriate in view of the complexities of the Peraso's CCAA Proceedings and the services to be provided by the beneficiaries of the Administration Charge.

Glibbery Affidavit at para 98, Application Record, Tab 2.

Monitor's Report at paras 50-51.

47. Section 11.52 of the CCAA provides statutory jurisdiction to grant such a charge:

> **11.52(1) Court may order security or charge to cover certain costs** — On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of
>
> > (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
> >
> > (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
> >
> > (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.
>
> **11.52(2) Priority** — This court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
>
> CCAA, s. 11.52.

48. In *Canwest Publishing*, Pepall J. identified six non-exhaustive factors that the Court may consider in addition to s. 11.52 of the CCAA when determining whether to grant an administration charge:

(a) the size and complexity of the business being restructured;

(b) the proposed role of the beneficiaries of the charge;

(c) whether there is an unwarranted duplication of roles;

(d) whether the quantum of the proposed charge appears to be fair and reasonable;

(e) the position of the secured creditors likely to be affected by the charge; and

(f) the position of the monitor.

Canwest Publishing Inc, Re, 2010 ONSC 222 [***Canwest Publishing***] at para 54 (CanLII).

49. Justice Pepall also indicated that the quantum of an administration charge is dependent on the facts, such as the magnitude and complexity of the restructuring.

Canwest Publishing at para 55 (CanLII).

50. In the present matter, the following factors support the granting of the Administration Charge as requested:

(a) the proposed restructuring involves complex litigation and cross-border matters, which will require the extensive involvement of the professional advisors subject to the Administration Charge, who will provide essential legal and financial advice throughout these CCAA proceedings;

(b) there is no anticipated unwarranted duplication of roles;

(c) the Administration Charge will rank in priority to the Directors' Charge and any existing secured creditors, all of whom were provided with notice that the Applicant was commencing this Application for creditor protection pursuant to the CCAA; and

(d) EY supports the Administration Charge and its proposed quantum.

Glibbery Affidavit, paras 97-99, Application Record, Tab 2.

Monitor's Report at paras 50-51.

ii. The Directors' Charge

51. The Applicant is seeking a charge over the Property in favour of its former and current directors in the amount of C$650,000 (the "**Directors' Charge**") in order to protect its directors and officers from the risk of significant personal exposure. The Directors' Charge is proposed to rank second in priority on the Property.

Glibbery Affidavit at paras 100-107, Application Record, Tab 2.

52. The Applicant's director and officers are presently protected by directors' and officers' insurance; however, given their exposure to personal liability, the directors and officers of the Applicant are unwilling to continue their roles with the Applicant unless the Initial Order grants the Directors' Charge in the amount of C$650,000. The Applicant requires the continued participation of its respective directors, officers, managers and employees in order to ensure the ongoing stability of its business.

Glibbery Affidavit at paras 102 and 104, Application Record, Tab 2.

Monitor's Report at para. 50-57.

53. Section 11.51 of the CCAA provides the Court with the express statutory jurisdiction to grant the Directors' Charge in an amount the Court considers appropriate, provided notice is given to the secured creditors who are likely to be affected by it:

> **11.51(1) Security or charge relating to director's indemnification** — On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.
>
> **11.51(2) Priority** — The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
>
> **11.51(3) Restriction** — indemnification insurance — The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

> **11.51(4) Negligence, misconduct or fault** — The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.
>
> CCAA, s. 11.51.

54. In *Jaguar Mining Inc*, Morawetz R.S.J. (as he then was) stated that, in order to grant a charge in favour of directors and officers, the Court must be satisfied of the following factors:

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

(b) the amount is appropriate;

(c) the applicant could not obtain adequate indemnification insurance for the director at a reasonable cost; and

(d) the charge does not apply in respect of any obligation incurred by a director as a result of the director's gross negligence or wilful misconduct.

> *Jaguar Mining Inc, Re*, 2014 ONSC 494 at para 45 [***Jaguar Mining Inc***] (CanLII).

55. With respect to the Applicant, the Directors' Charge is reasonable in the circumstances because:

(a) the Applicant has given notice to the secured creditors likely to be affected by the Directors' Charge;

(b) the proposed Monitor is of the view that the Directors' Charge is reasonable and appropriate in the circumstances;

(c) the Applicant will require the active and committed involvement of the directors and officers, whose continued participation is necessary for an effective restructuring; and

(d) the Directors' Charge does not secure obligations incurred by a director as a result of the director's gross negligence or wilful misconduct.

Glibbery Affidavit at paras 100-107, Application Record, Tab 2.

Monitor's Report at paras 50-57.

D. THE PROPOSED MONITOR SHOULD BE AUTHORIZED AND EMPOWERED TO ACT AS FOREIGN REPRESENTATIVE

56. Pursuant to s. 56 of the CCAA, this Court has the unfettered authority to appoint a Court "any person or body" to act as a representative for the purpose of having these CCAA proceedings recognized in any jurisdiction outside of Canada, including but not limited to the United States.

CCAA, s. 56.

57. The Applicant seeks the appointment of the proposed Monitor as the foreign representative of the Applicant. It is not uncommon for the monitor, as an officer of this Court, to be appointed as foreign representative.

Nortel Networks Corporation (Re), 2009 CanLII 726 (Ont. S.C.J. [Comm. List]) at para 43 (CanLII).

Cinram International Inc. (Re), 2012 ONSC 3767 (Ont. S.C.J. [Comm. List]) [***Cinram***] at paras 31-35 (CanLII).

58. If appointed as foreign representative, the proposed Monitor intends to initiate the Chapter 15 Proceedings in the US Court seeking, among other things: (i) recognition of this CCAA proceeding as a foreign main proceeding; (ii) recognition and enforcement of the Initial Order; and (iii) other appropriate relief under the Bankruptcy Code.

Glibbery Affidavit at para 109, Application Record, Tab 2.

Monitor's Report at paras 45-46.

59. The Chapter 15 Proceedings are necessary so that this Court's stay of proceedings as established by the Initial Order (if granted by this Court) is enforceable in the U.S. generally and the SDNY Court in particular. If recognized and enforced, the stay of proceedings would have the effect of staying the Licence Litigation.

Glibbery Affidavit at paras 110-113, Application Record, Tab 2.

60. Accordingly, the Applicant seeks authorization in the Initial Order for the proposed Monitor to seek recognition of these proceedings in the United States under Chapter 15 of the Bankruptcy Code.

E. THE RELIEF SOUGHT IS REASONABLY NECESSARY

61. Pursuant to s. 11.001, the relief sought on an initial application is to be limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during the initial stay period.

CCAA, s. 11.001, 11.02(1) and (3).

62. The stated purpose of s. 11.001 is to "limit the decisions that can be taken at the outset of a CCAA proceeding to measures necessary to avoid the immediate liquidation of an insolvent company, thereby improving participation of all players."

Lydian International Limited (Re), 2019 ONSC 7473 at paras 22-26 [***Lydian***] (CanLII), citing Government of Canada (Press Release), "Insolvency reforms to come into force" (4 September 2019), online: <perma.cc/8SLT-ZADL>.

63. Further, the relief sought in respect of the Chapter 15 Proceedings is reasonably necessary given the ongoing multi-jurisdictional litigation commenced by Ubiquiti in the SDNY Court. It is necessary for the Applicant to ensure that this Court's stay of proceedings, if granted in the proposed Initial Order, is recognized and enforced in the United States.

Glibbery Affidavit at para 112, Application Record, Tab 2.

64. The Applicant has limited the relief sought on this initial application to only the relief that is reasonably necessary in the circumstances for the continued operation of its business. After using the initial stay period to stabilize its business, the Applicant intends to return to this Court to request further relief. Accordingly, the Applicant submits that the relief sought on this initial application is in accordance with s. 11.001 of the CCAA and should be granted.

Glibbery Affidavit at para 96, Application Record, Tab 2.

PART V - ORDER SOUGHT

65. For the foregoing reasons, the Applicant respectfully requests that this Court grant an Order substantially in the form of the draft Initial Order attached at Tab 3 to the Applicant's application record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 3rd day of June, 2020.

Stikeman Elliott LLP

Stikeman Elliott LLP
Lawyers for the Applicant

SCHEDULE "A"
LIST OF AUTHORITIES

Cases

1. *Stelco Inc, Re*, 2004 CanLII 24933 (Ont. S.C.J. [Comm. List]) (CanLII)
2. *Ted Leroy Trucking [Century Services] Ltd, Re*, 2010 SCC 60 (CanLII)
3. *Canwest Global Communications Corp.*, 2011 ONSC 2215 (CanLII).
4. *Nortel Networks Corp. (Re)*, 2009 CanLII 39492 (Ont. S.C.J. [Comm. List]) (CanLII)
5. *Great Basin Gold Ltd. (Re)*, 2015 BCSC 1199 at para 32 (CanLII)
6. *Canwest Publishing Inc, Re*, 2010 ONSC 222 (CanLII)
7. *Jaguar Mining Inc, Re*, 2014 ONSC 494 (CanLII)
8. *Nortel Networks Corporation (Re),* 2009 CanLII 726 (S.C.J. [Comm. List]) (CanLII)
9. *Cinram International Inc. (Re)*, 2012 ONSC 3767 (Ont. S.C.J. [Comm. List]) (CanLII)
10. *Lydian International Limited (Re)*, 2019 ONSC 7473 (CanLII)

SCHEDULE "B"
RELEVANT STATUTES

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

Definitions

2 (1) In this Act, […]

> **company** means any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province, any incorporated company having assets or doing business in Canada, wherever incorporated, and any income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the Bank Act, telegraph companies, insurance companies and companies to which the Trust and Loan Companies Act applies; (compagnie) […]
>
> **debtor company** means any company that
>
> > (a) is bankrupt or insolvent,
> >
> > (b) has committed an act of bankruptcy within the meaning of the Bankruptcy and Insolvency Act or is deemed insolvent within the meaning of the Winding-up and Restructuring Act, whether or not proceedings in respect of the company have been taken under either of those Acts,
> >
> > (c) has made an authorized assignment or against which a bankruptcy order has been made under the Bankruptcy and Insolvency Act, or
> >
> > (d) is in the course of being wound up under the Winding-up and Restructuring Act because the company is insolvent; (compagnie débitrice)

[…]

Application

3 (1) This Act applies in respect of a debtor company or affiliated debtor companies if the total of claims against the debtor company or affiliated debtor companies, determined in accordance with section 20, is more than $5,000,000 or any other amount that is prescribed.

[…]

Jurisdiction of court to receive applications

9 (1) Any application under this Act may be made to the court that has jurisdiction in the province within which the head office or chief place of business of the company in Canada is situated, or, if the company has no place of business in Canada, in any province within which any assets of the company are situated.

[…]

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 — directors

11.03 (1) An order made under section 11.02 may provide that no person may commence or continue any action against a director of the company on any claim against directors that arose before the commencement of proceedings under this Act and that relates to obligations of the company if directors are under any law liable in their capacity as directors for the payment of those obligations, until a compromise or an arrangement in respect of the company, if one is filed, is sanctioned by the court or is refused by the creditors or the court.

Exception

11.03 (2) Subsection (1) does not apply in respect of an action against a director on a guarantee given by the director relating to the company's obligations or an action seeking injunctive relief against a director in relation to the company.

[...]

Persons obligated under letter of credit or guarantee

11.04 No order made under section 11.02 has affect on any action, suit or proceeding against a person, other than the company in respect of whom the order is made, who is obligated under a letter of credit or guarantee in relation to 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.

[…]

Security or charge relating to director's indemnification

11.51 (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, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

Priority

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

Restriction — indemnification insurance

11.51 (3) The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

Negligence, misconduct or fault

11.51 (4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

[…]

Court may order security or charge to cover certain costs

11.52 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

(a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;

(b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

Priority

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

[…]

Court to appoint monitor

11.7 (1) When an order is made on the initial application in respect of a debtor company, the court shall at the same time appoint a person to monitor the business and financial affairs of the company. The person so appointed must be a trustee, within the meaning of subsection 2(1) of the Bankruptcy and Insolvency Act.

Restrictions on who may be monitor

11.7 (2) Except with the permission of the court and on any conditions that the court may impose, no trustee may be appointed as monitor in relation to a company

(a) if the trustee is or, at any time during the two preceding years, was

(i) a director, an officer or an employee of the company,

(ii) related to the company or to any director or officer of the company, or

(iii) the auditor, accountant or legal counsel, or a partner or an employee of the auditor, accountant or legal counsel, of the company; or

(b) if the trustee is

(i) the trustee under a trust indenture issued by the company or any person related to the company, or the holder of a power of attorney under an act constituting a hypothec within the meaning of the Civil Code of Quebec that is granted by the company or any person related to the company, or

(ii) related to the trustee, or the holder of a power of attorney, referred to in subparagraph (i).

[…]

Authorization to act as representative of proceeding under this Act

56 The court may authorize any person or body to act as a representative in respect of any proceeding under this Act for the purpose of having them recognized in a jurisdiction outside Canada.

***Bankruptcy and Insolvency Act*, RSC 1985, c B-3**

Definitions

2 In this Act, […]

> **insolvent person** means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and
>
> > (a) who is for any reason unable to meet his obligations as they generally become due,
> >
> > (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
> >
> > (c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due; (personne insolvable) […]
>
> **trustee** or **licensed trustee** means a person who is licensed or appointed under this Act. (syndic ou syndic autorisé)

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 PERASO TECHNOLOGIES INC.

Court File No.: ____________________

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
Proceeding commenced at Toronto

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