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COURT OF QUEEN'S BENCH
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JUDICIAL CENTRE

CALGARY

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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 NORTH AMERICAN LAMB
COMPANY LTD., CANADA SHEEP AND LAMB FARMS
LTD., CANADA SHEEP HOLDINGS LTD., LAMB CLUB
MARKETING LIMITED, CANADA LAMB GROWERS
LTD., CANADA LAMB PROCESSORS LTD. and
CANINE FARE LTD.

COM
Aug 8 2022

APPLICANT

FRESH CANADA MEATS LTD.

DOCUMENT

**BENCH BRIEF OF THE APPLICANT
(INITIAL CCAA ORDER)**

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TABLE OF CONTENTS

I.	INTRODUCTION, PARTIES, AND BACKGROUND	- 2 -
A.	Introduction	- 2 -
B.	Summary of Facts	- 3 -
II.	ISSUES	- 6 -
III.	LAW AND ARGUMENT	- 7 -
A.	FCM has standing to bring an application for an Initial Order under the CCAA in regard to the NALCO Group	- 7 -
B.	The NALCO Group meets the statutory requirements of the CCAA as a group of insolvent affiliated debtor companies	- 10 -
C.	It is appropriate for the Court to exercise its discretion to grant an Initial Order in respect of the NALCO Group.....	- 11 -
D.	It is necessary and appropriate to grant enhanced powers to the Monitor.....	- 13 -
E.	It is necessary and appropriate to approve the KEIP, the KEIP Charge and the Sealing Order.....	- 16 -
E.	The Administration Charge is Necessary and Appropriate.....	- 19 -
IV.	REQUESTED RELIEF	- 21 -

I. INTRODUCTION, PARTIES, AND BACKGROUND

A. Introduction

1. This Brief of Law is submitted on behalf of the Applicant, Fresh Canada Meats Ltd. (“**FCM**”), in support of its application for an Initial Order pursuant to the *Companies’ Creditors Arrangement Act*, RSC 1985, c C-36, as amended¹ (the “**CCAA**”) for, among other things:
 - (a) the granting of a stay of proceedings to facilitate the restructuring and/or orderly wind down of North American Lamb Company Ltd. (“**NALCO**”) and its subsidiaries, Canada Sheep and Lamb Farms Ltd., Canada Sheep Holdings Ltd., Lamb Club Marketing Limited, Canada Lamb Growers Ltd., Canada Lamb Processors Ltd., and Canine Fare Ltd. (collectively, the “**Subsidiaries**” and together with NALCO, the “**NALCO Group**”);
 - (b) the appointment of Ernst & Young Inc. (the “**Monitor**”) as court-appointed monitor of the NALCO Group;
 - (c) granting the Monitor the enhanced powers necessary to enable it to manage the NALCO Group in the face of the resignation of all directors from the boards of directors of NALCO and the Subsidiaries;
 - (d) approving a Key Employee Incentive Plan (the “**KEIP**”) to provide incentives to certain key employees of the NALCO Group to continue to provide services to the NALCO Group during the restructuring, secured by a court-ordered charge on the assets of the NALCO Group the (“**KEIP Charge**”); and
 - (e) approving a court ordered charge on the assets of the NALCO Group to secure the fees of the Monitor, counsel to the Monitor and counsel to FCM, (the “**Administrative Charge**”).
2. FCM has filed the Affidavit of Gary Alexander sworn on August 4, 2022 (the “**Alexander Affidavit**”), in support of its Originating Application for an Initial Order. Capitalized terms not otherwise defined herein have the meaning given to them in the Alexander Affidavit.²
3. The NALCO Group is Canada’s largest lamb producer and processor. The NALCO Group is insolvent and owes over \$5,000,000.00 in liabilities to its creditors. The NALCO Group’s

¹ *Companies’ Creditors Arrangement Act*, RSC 1985, c C-36 [CCAA].

² Affidavit of Gary Alexander, sworn August 4, 2022 [Alexander Affidavit].

insolvency has arisen from operational losses incurred since its inception and a liquidity crisis which has rendered the NALCO Group unable to continue to fund ongoing operations in the ordinary course. To this point, FCM has financed all or substantially all of the NALCO Group's operating losses and is currently owed over \$10,000,000.00 by the NALCO Group. Initial plans have been developed to resolve the NALCO Group's insolvency, including through a potential bulk sale of the NALCO Group's sheep flock, which would minimize the NALCO Group's operational losses going forward and would ensure the welfare of the flock in face of the NALCO Group's impending inability to purchase feed for the flock. The stability of CCAA proceedings is necessary in order to permit the NALCO Group to pursue its restructuring and/or an orderly wind down of its operations.

4. In addition to the standard Initial Order, an order providing the Monitor with enhanced powers to manage the NALCO Group and approving of the KEIP to incentivize employees to continue to serve the NALCO Group during the restructuring is necessary to provide the NALCO Group with the stability required to pursue its restructuring. The only remaining director of the NALCO Group has expressed his intention to resign prior to the hearing of this application. The Monitor requires enhanced powers to exercise the traditional management functions of the boards of directors of the NALCO Group and to facilitate the continued operation of the NALCO Group and the restructuring. Further, the Key Employees are required to provide their specialized knowledge of sheep husbandry and the Canadian lamb market to ensure that the welfare of the livestock is maintained during the restructuring and that the NALCO Group's stakeholders' interests are protected.

B. Summary of Facts

5. The NALCO Group was formed in the summer of 2018 by a merger effected through the transfer of the shares of the holding companies of two established lamb production and marketing groups, FCM and 2079467 Alberta Ltd. ("**207 AB Ltd.**"), to NALCO.³ FCM owns 58.6% of the shares in NALCO and 207 AB Ltd. owns 41.4% of the shares in NALCO.⁴ NALCO, in turn, holds all or substantially all of the shares in the Subsidiaries.⁵

³ Alexander Affidavit at para 5

⁴ Alexander Affidavit at para 8.

⁵ Alexander Affidavit at para 8.

6. The NALCO Group operates a vertically integrated lamb production and marketing enterprise, with accelerated sheep breeding facilities in Lundar, Manitoba; Sarto, Manitoba; Rockwood, Manitoba and Iron Springs, Alberta; a lamb growing facility in Stony Mountain, Manitoba; a feedlot in Iron Springs, Alberta; and a meat processing facility in Innisfail, Alberta.⁶ In addition to growing and processing its own lambs from birth, the NALCO Group receives lambs from other producers at its feedlot facility in Iron Springs, Alberta and processes lambs from private producers throughout Western Canada at its meat processing facility in Innisfail, Alberta.⁷
7. The NALCO Group is the largest lamb producer and processor in Canada, owning approximately 25,000 breeding ewes, which have the capacity of lambing in excess of 70,000 lambs per year.⁸ The NALCO Group supplies a significant portion of the lamb to Canadian grocers, including Sobeys, SaveOnFoods, Safeway, Co-op, and Metro.⁹
8. Despite its prominence in the Canadian lamb market, the NALCO Group has incurred ongoing operating losses since its establishment in 2018.¹⁰ The NALCO Group's losses have been financed by approved share capital raises and unsecured shareholder loans advanced to the NALCO Group primarily by FCM, which unsecured loans total \$10,136,365.00. As a result, FCM is the NALCO Group's largest unsecured creditor.¹¹
9. The NALCO Group's financial difficulties came to head in its most recent fiscal year when the relationship between FCM and 207 AB Ltd. became somewhat strained, causing the governance of the boards of directors of the NALCO Group to become deadlocked and dysfunctional.¹² At or about this time, the NALCO Group became unable to raise funds to continue to finance its obligations.¹³
10. In May of 2022, the NALCO Group ran out of the operating funds required to meet its obligations.¹⁴ In the end of May and the beginning of June 2022, the NALCO Group's financing situation became dire, causing the CEO of NALCO and the nominee of FCM, Gary

⁶ Alexander Affidavit at paras 10-13.

⁷ Alexander Affidavit at paras 12-13.

⁸ Alexander Affidavit at para 11.

⁹ Alexander Affidavit at para 40.

¹⁰ Alexander Affidavit at para 41.

¹¹ Alexander Affidavit at paras 34-35 and 41.

¹² Alexander Affidavit at para 42.

¹³ Alexander Affidavit at paras 42-44.

¹⁴ Alexander Affidavit at para 44.

Alexander (“**Mr. Alexander**”), to engage with the NALCO Group’s senior secured creditors, The Bank of Nova Scotia (“**BNS**”) and Farm Credit Canada (“**FCC**”), to find a solution to the NALCO Group’s liquidity issues.¹⁵

11. On June 14, 2022, Mr. Alexander circulated a resolution authorizing a representative of the NALCO Group to consult with the NALCO Group’s lawyers to resolve the NALCO Group’s liquidity issues through a Consent Receivership.¹⁶ The NALCO Group’s directors that were nominees of 207 AB Ltd., Dwayne Beaton (“**Mr. Beaton**”) and Glenn Mackey (“**Mr. Mackey**”), returned a signed copy of the resolution from 207 AB Ltd.’s counsel on the trust condition that it not be released until Mr. Alexander and Alan Haronga (“**Mr. Haronga**”), another director of the NALCO Group and nominee of FCM, resign from all positions as director or officer of NALCO and the Subsidiaries.¹⁷ Mr. Alexander and Mr. Haronga resigned their positions as directors and officers of the NALCO Group on June 15, 2022.¹⁸
12. On June 24, 2022, and without advance notice, Mr. Beaton and Mr. Mackey sent correspondence indicating their intention to resign their positions as directors and officers of the NALCO Group effective June 27, 2022.¹⁹ Mr. Beaton and Mr. Mackey duly resigned their positions as directors and officers of the NALCO Group and left the boards of directors of NALCO and the Subsidiaries vacant.
13. As a result of the corporate governance and management issues created by the vacancy of the boards of directors of the NALCO Group, Mr. Haronga agreed to be re-elected to the boards of directors and was elected to the boards of directors of the NALCO Group by a shareholders’ resolution dated June 30, 2022, which was signed by each of FCM and 207 AB Ltd.²⁰
14. On July 22, 2022, each of BNS and FCC served NALCO and the Subsidiaries with demands for repayment of their indebtedness, including Notices of Intent by Secured Creditor under section 21 of the *Farm Debt Mediation Act*, SC 1997, c 21 and Notices of Intention to Enforce Security under section 244 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3.²¹ As

¹⁵ Alexander Affidavit at paras 45-47.

¹⁶ Alexander Affidavit at para 47.

¹⁷ Alexander Affidavit at para 48.

¹⁸ Alexander Affidavit at para 49.

¹⁹ Alexander Affidavit at para 50.

²⁰ Alexander Affidavit at para 52.

²¹ Alexander Affidavit at paras 54-56.

at the date of the demands, the NALCO Group owed BNS approximately \$14,491,144.39 and FCC approximately \$24,103,728.22.²²

15. The NALCO Group continues to face severe liquidity issues and will face great difficulties feeding and maintaining the approximately 56,000 sheep in its possession beyond the summer months.²³ A considerable amount of additional feed expenditure would be required once existing feed supplies on hand are utilized.²⁴ A time-sensitive and flexible solution is necessary in order to avoid a situation developing in which the health and welfare of the livestock is put at risk.²⁵
16. The Monitor has consented to its appointment as monitor of the NALCO Group and has been engaging with a potential purchaser for a bulk sale of the NALCO Group's sheep.²⁶ Regardless of whether or not that sale is completed, the NALCO Group will have to continue to operate for some time to facilitate the transfer of the sheep. The NALCO Group requires the stability of CCAA proceedings in order to develop a plan for liquidation of its property and to continue to operate and to preserve the livestock flock until such a plan may be developed and implemented.
17. The two senior secured creditors of the NALCO Group, BNS and FCC, support the granting of the relief sought in this Application. FCM, BNS, and FCC are collectively owed over \$48,000,000.00 by the NALCO Group.²⁷

II. ISSUES

18. This Application raises the following issues:
 - a. Does FCM have standing to bring an application for an Initial Order under the CCAA in regard to the NALCO Group?
 - b. Does the NALCO Group meet the statutory requirements of the CCAA as a group of insolvent affiliated debtor companies?

²² Alexander Affidavit at paras 25 and 29.

²³ Alexander Affidavit at para 57.

²⁴ Alexander Affidavit at para 57.

²⁵ Alexander Affidavit at para 58.

²⁶ Alexander Affidavit at para 58.

²⁷ Alexander Affidavit at paras 25, 29, and 34.

- c. Is it appropriate for the Court to exercise its discretion to grant the NALCO Group a stay of proceedings by its creditors under an Initial Order?
- d. Is it appropriate that the Monitor be granted the enhanced powers to manage the NALCO Group?
- e. Is it appropriate for the Court to approve the KEIP and KEIP Charge, and associated Sealing Order in the Initial Order?
- f. Is the Administration Charge appropriate in the circumstances?

III. LAW AND ARGUMENT

A. FCM has standing to bring an application for an Initial Order under the CCAA in regard to the NALCO Group

19. The power to apply to the Court for an order commencing proceedings is provided in sections 11 and 11.02 of the CCAA, which collectively provide that a person interested in the matter may bring an application commencing proceedings in respect of a debtor company:²⁸

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.

...

Stays, ect. – 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

²⁸ *Supra* note 1.

period that the court considers necessary, which period may not be more than 10 days...

[emphasis added]

20. Creditors, having a stake in the outcome of debtor companies' financial recoveries positions, have a sufficient interest to be classified as "persons interested in the matter" with standing to bring applications for initial orders under the CCAA. This conclusion is supported by sections 4 and 5 of the CCAA, which provide creditors of debtor companies with the express power to propose a compromise or a plan of arrangement. If creditors have the power to propose a compromise or an arrangement, it follows that creditors must have the power to commence CCAA proceedings in order to exercise that power. Sections 4 and 5 of the CCAA read as follows²⁹

Compromise with unsecured creditors

4 Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company, of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

Compromise with secured creditors

5 Where a compromise or an arrangement is proposed between a debtor company and its secured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

²⁹ *Supra* note 1.

21. Courts have consistently held that creditors have standing to commence proceedings for Initial Orders under the CCAA concerning debtor companies. In *Miniso International Hong Kong Limited v Migu Investments Inc.*³⁰ ("**Miniso International**"), Justice Fitzpatrick concluded that sections 4 and 5 of the CCAA expressly grant standing to creditors to commence proceedings in respect of debtor companies:³¹

[1] The petitioners bring these proceedings pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA"). Unlike the usual circumstance where the debtor companies commence the proceedings, the petitioners are the secured creditors of the respondent debtor companies, resulting in a creditor-driven CCAA proceeding.

...

[45] The CCAA expressly grants standing to creditors, such as the Miniso Group, to commence proceedings in respect of a debtor company: CCAA, ss. 4-5; *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, [2008] O.J. No. 1818 (Ont. S.C.J. [Commercial List]) at para. 34.

22. In *Re MJardin Group Inc.*,³² Chief Justice Morawetz, following *Miniso International*, granted an application brought by a creditor to commence proceedings under the CCAA, holding that it "is well-established that creditors may bring an application for an initial order under the CCAA in respect of a debtor company."³³
23. FCM has a significant financial stake in the outcome of the NALCO Group's insolvency proceedings pursuant to its unsecured claim of over \$10,000,000.00 against the NALCO Group. Accordingly, FCM is a person interested in the matter of the NALCO Group's insolvency proceedings under sections 11 and 11.02 of the CCAA. Further, as an unsecured creditor of the NALCO Group, FCM has the express power to propose compromises and arrangements in regard to the NALCO Group under section 4 of the CCAA, which includes the incidental power to commence proceedings for an Initial Order in regard to the NALCO Group under the CCAA.

³⁰ 2019 BCSC 1234, 71 CBR (6th) 250 [*Miniso International*].

³¹ *Ibid.*

³² 2022 ONSC 3338.

³³ *Ibid* at para 21.

24. For the foregoing reasons, FCM respectfully submits that it has standing to bring an application to commence proceedings for an Initial Order in regard to the NALCO Group.

B. The NALCO Group meets the statutory requirements of the CCAA as a group of insolvent affiliated debtor companies

25. Subsection 3(1) of the CCAA provides that the Court has the power to grant a stay of proceedings under the CCAA in regard to “affiliated debtor companies” where the total claims against such companies exceed \$5,000,000.³⁴ “Affiliated debtor companies” is defined in subsections 3(2), 3(3) and 3(4) to mean, among other things, a parent company and a company that is its subsidiary by virtue of the parent company holding fifty per cent of the votes that may be cast to elect directors of the subsidiary, two subsidiaries of the same parent company, and a subsidiary of a subsidiary.³⁵
26. The definition of “affiliated debtor companies” must also be read in accordance with the definition of “debtor company” in section 2(1), which provides that “debtor company” means, among other things, a company that is bankrupt or insolvent.³⁶ Affiliated debtor companies, like debtor companies, must also be insolvent to attract the protection of the CCAA. Companies are insolvent for the purpose of the CCAA where they are “reasonably expected to run out of liquidity within a reasonable proximity of time as compared with the time reasonably required to implement a restructuring.”³⁷ Debtor companies are not required to reach the point of having insufficient cash to operate as, at such point, the rehabilitative objectives of the CCAA would be undermined.³⁸
27. The NALCO Group collectively meets the definition of “affiliated debtor companies”. NALCO owns substantially all of the shares in and controls each of the Subsidiaries.³⁹ The NALCO Group also owes over \$5,000,000.00 in liabilities to its creditors. The debts owed by the NALCO Group to FCM, BNS, and FCC amount to approximately \$48,000,000.00.⁴⁰ Finally, the NALCO Group is insolvent. The NALCO Group is unable to meet its obligations as they

³⁴ *Supra* note 1.

³⁵ *Supra* note 1.

³⁶ *Supra* note 1.

³⁷ *Re Stelco Inc.* (2004), 48 CBR (4th) 299 at para 25-26 (Ont Sup Ct J).

³⁸ *Ibid* at para 25.

³⁹ Alexander Affidavit at para 8.

⁴⁰ Alexander Affidavit at paras 25, 29, and 34.

become due and repayment has been demanded by BNS and FCC.⁴¹ The NALCO Group is quickly running out of cash to purchase feed to maintain its sheep flock.⁴²

28. Accordingly, the NALCO Group meets the statutory requirements of the CCAA as a group of insolvent affiliated debtor companies.

C. It is appropriate for the Court to exercise its discretion to grant an Initial Order in respect of the NALCO Group

29. The granting of an Initial Order is a discretionary matter for the Court to be exercised in light of three considerations, namely, (1) that the Initial Order is appropriate in the circumstances, (2) that the applicant is acting in good faith, and (3) that the applicant is acting with diligence.⁴³ Applications for Initial Orders generally rest on the first consideration, with an in-depth consideration of the latter two facts given more prominence in applications to extend the stay of proceedings provided in the Initial Order.⁴⁴
30. The consideration of whether an initial order is appropriate in the circumstances requires an assessment of whether the Initial Order would advance the policy objectives of the CCAA.⁴⁵ The policy objectives of the CCAA have historically included the rehabilitation of debtor companies, avoiding the social and economic losses resulting from liquidation, and the fair treatment of stakeholders.⁴⁶ More recently, it has become widely accepted that the maximization of stakeholder recovery through flexible liquidation processes is a legitimate objective of the CCAA, and that courts may exercise their discretion to grant Initial Orders in order to maximize stakeholder recovery through “liquidating CCAA’s”.⁴⁷ The key consideration whether Initial Orders under the CCAA should be granted to allow debtor companies to pursue liquidation is the complexity of the restructuring/liquidation. More complex liquidations require the flexibility of the CCAA. As discussed by Justice Brown (as he then was) in *Re First Leaside Wealth Management*:⁴⁸

⁴¹ Alexander Affidavit at paras 54-56.

⁴² Alexander Affidavit at paras 57-58.

⁴³ 9354-9186 *Québec inc. v Callidus Capital Corp.*, 2020 SCC 10 at para 49, 444 DLR (4th) 373 [*Calidus*].

⁴⁴ *Industrial Properties Regina Limited v Copper Sands Land Corp.*, 2018 SKCA 36 at para 34, 422 DLR (4th) 749.

⁴⁵ See *Calidus*, *supra* note 43 at para 50.

⁴⁶ *Ibid* at paras 40-41.

⁴⁷ *Ibid* at paras 42-46.

⁴⁸ 2012 ONSC 1299.

C. "Liquidation" CCAA

[32] While in most circumstances resort is made to the CCAA to "permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets" and to create "conditions for preserving the status quo while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all", the reality is that "reorganizations of differing complexity require different legal mechanisms." That reality has led courts to recognize that the CCAA may be used to sell substantially all of the assets of a debtor company to preserve it as a going concern under new ownership, or to wind-up or liquidate it.

[emphasis added]

31. The granting of an Initial Order concerning the NALCO Group is appropriate in the circumstances. A plan for restructuring the NALCO Group is in the process of being developed, under which the NALCO Group's sheep flock would potentially be sold.⁴⁹ While this plan contemplates liquidation of one of the NALCO Group's principal assets, the flexibility of the CCAA is necessary in order to maximize the recovery for the livestock, given the ongoing need to care for the sheep flock and to continue the NALCO Group's operations during the transition of ownership.
32. If the sheep flock is sold and the NALCO Group's animal welfare risks are mitigated, a plan will have to be developed concerning the remainder of the NALCO Group's assets, including its three breeding facilities, its lamb growing facilities, its feedlot, and its meat processing facility. It is possible that a portion of these facilities or businesses operated out of the facilities could be operated or sold as a going concern. The flexibility and time provided by CCAA proceedings is necessary in order to permit the facilities to be operated while a plan is developed for the continued operation and/or sale of the facilities or businesses so that recovery to stakeholders may be maximized. .

⁴⁹ Alexander Affidavit at para 57.

33. In short, the complexity of the NALCO Group's insolvency, involving indebtedness to creditors of over \$48,000,000.00,⁵⁰ vertically integrated business operations,⁵¹ property consisting of 55,000 live animals,⁵² and property located in multiple jurisdictions,⁵³ requires the flexibility of CCAA proceedings. No other insolvency regime will provide a sufficient means to deal with the legal and commercial issues necessary to maximize stakeholder value. An Initial Order, therefore, is appropriate in the circumstances.
34. FCM is acting in good faith. FCM has brought the application for an Initial Order to maximize recovery for all creditors the NALCO Group and to address the NALCO Group's insolvency.
35. FCM has diligently pursued restructuring options for the NALCO Group, and has not delayed bringing an application for an Initial Order in order to obtain a procedural advantage.⁵⁴ FCM has worked to develop potential options to resolve the NALCO Group's insolvency, and has developed a "germ of a plan" justifying granting the NALCO Group protection under the CCAA.⁵⁵ It is anticipated that the NALCO Group and the Monitor should be able to develop a plan for addressing the NALCO Group's insolvency upon the granting of an Initial Order.
36. For all of these reasons, FCM respectfully submits that the Court should exercise its discretion to grant an Initial Order under the CCAA concerning the NALCO Group.

D. It is necessary and appropriate to grant enhanced powers to the Monitor

37. Section 23(1)(k) of the CCAA permits the Court to grant monitors the power to "carry out any other functions in relation to the company that the court may direct". The Court has utilized this subsection to grant monitors enhanced or "supermonitor" powers to manage debtor companies in a variety of cases. The least controversial of these circumstances is where the directors of debtor companies have resigned or expressed an intention to resign their offices, thereby leaving a void in the corporate governance and management of the

⁵⁰ Alexander Affidavit at paras 25, 29, and 34.

⁵¹ Alexander Affidavit at paras 10-13.

⁵² Alexander Affidavit at paras 20.

⁵³ Alexander Affidavit at para 21.

⁵⁴ See *Calidus*, supra note 43 at para 51 where Chief Justice Wagner held that the purpose of the due diligence requirement is to ensure that parties do not sit on their rights to "strategically manoeuvre or position themselves to gain an advantage".

⁵⁵ *Alberta Treasury Branches v Tallgrass Energy Corp.*, 2013 ABQB 432 at para 14, 8 CBR (6th) 161.

debtor company. As discussed by Luc Morin and Arad Mojahedi in “In Search of a Purpose: The Rise of Super Monitors & Creditor-Driven CCAA’s”:⁵⁶

From recent cases, we have identified four scenarios in which courts have allowed a secured creditor to rely on the CCAA while extending the powers of the monitor, rather than proceeding with a receivership under section 243 of the BIA:

- **Resignation of the management body**: when all directors and officers resign after a CCAA process has been initiated, courts have allowed for the continuation of the CCAA process by extending powers to the monitor akin to those of a receiver. Commonly referred to as a “super monitor,” these powers allow the monitor to have direct powers over the assets, property and undertakings of the insolvent corporation and, for all intents and purposes, to act in lieu of management;
- **Unfitness of management to conduct CCAA proceedings**: this is trickier because it requires a demonstration that management is not fit to conduct a formal CCAA proceedings without causing harm to the stakeholders, akin to a fiduciary duties violation;
- **Management has no plan or their plan is doomed to fail**: this requires an analysis from the Court that management has no germ of a plan or that any potential restructuring plan is doomed to fail; and
- **Management being conflicted**: in the event that management is contemplating sponsoring or being associated with a bid in respect to the company’s assets, property and undertaking in the context of a SISP.

⁵⁶ 2019 Ann Rev Insolv 14.

38. This Honourable Court has granted monitors enhanced powers to manage debtor companies on the resignation of directors in a number of cases.⁵⁷ Further, Courts have granted monitors enhanced powers in Initial Orders under the CCAA.⁵⁸
39. The final remaining director of NALCO and the Subsidiaries, Mr. Haronga, has expressed his intention to resign shortly before the hearing of the Initial Application.⁵⁹ The NALCO Group will be left without any directors and officers upon Mr. Haronga's resignation.⁶⁰ The director-nominees of 207 AB Ltd., in the face of the prospect of insolvency proceedings, resigned on June 27, 2022.⁶¹ 207 AB Ltd. has not expressed any intention of appointing replacement directors to serve on the boards of directors during the NALCO Group's restructuring. Accordingly, the NALCO Group will be left without anyone to exercise its corporate governance and executive management functions during the NALCO Group's restructuring.
40. The granting of enhanced powers to the Monitor similar to those exercised by boards of directors during the NALCO Group's restructuring is necessary in order to ensure that acts undertaken by the corporation's agents are authorized, that the restructuring may be facilitated, and that the value of the NALCO Group's assets is preserved and maximized. The Monitor, as an experienced and well-regarded insolvency practitioner and neutral party, is well-positioned to manage the business of the NALCO Group and to balance the NALCO Group's stakeholders' interests during the restructuring.

⁵⁷ See e.g., *Re 2324159 Alberta Inc.* (14 May 2021) Court File Number 2001-05482, Judicial Centre of Calgary, (unreported) (Eidsvik J.); *Re Argent Energy Trust* (27 June 2016) Court File Number 1601-01675, Judicial Centre of Calgary, (unreported) (Nixon J.); and *Re Broadacre Agriculture Inc.* (29 July 2015), Court File Number 1401-11768, Judicial Centre Calgary (unreported) (Dario J.).

⁵⁸ *Re Port Capital Development (EV) Inc.* (20 May 2020), Court File Number No. S-205095 Judicial Centre Vancouver, (unreported) (Fitzpatrick J.); *Re Miniso International Hong Kong Limited* (12 July 2019), Court File No S-197744, Judicial Centre Vancouver (Fitzpatrick J.) reported at *Miniso*, *supra* note 30; and *Re Gedex Systems Inc.* (12 August 2019), Court File Number CV-19-625224-00CL, Judicial Centre Toronto, (unreported) (Penny J.).

⁵⁹ Alexander Affidavit at para 64.

⁶⁰ Alexander Affidavit at para 64-65.

⁶¹ Alexander Affidavit at para 50.

41. The granting of the enhanced powers to the Monitor in the Initial Order is reasonably necessary to ensure proper corporate governance and for the continued operation of the NALCO Group in the normal course until the proceedings may be brought back before the Court (as required under section 11.001 of the CCAA).⁶² Many ordinary course business decisions are required to be made by directors, and the vacancies of the board of directors could compromise the willingness of third parties to deal with the NALCO Group. Delaying the granting of the enhanced powers will not have a substantial impact on shareholder interests. Neither FCM and 207 AB Ltd.'s expressed an intention of exercising their rights to appoint directors to NALCO or the Subsidiaries. The Monitor has agreed to exercise the enhanced powers to manage the NALCO Group.
42. Accordingly, FCM respectfully submits that the Monitor should be granted enhanced powers as part of the Initial Order.

E. It is necessary and appropriate to approve the KEIP, the KEIP Charge and the Sealing Order

43. The Court has the authority to approve Key Employee Incentive Plans and charges to secure Key Employee Incentive Plans under its general power under section 11 of the CCAA.
44. Justice Morawetz identified eight factors for consideration by the Court in exercising its power to approve Key Employee Incentive Plans in *Re Cinram International Inc.*:⁶³

[91] The CCAA is silent with respect to the granting of KERP charges. Approval of a KERP and a KERP charge are matters within the discretion of the Court. The Court in *Grant Forest Products Inc., Re* [2009 CarswellOnt 4699 (Ont. S.C.J. [Commercial List])] considered a number of factors in determining whether to grant a KERP and a KERP charge, including:

⁶² Section 11.001 of the CCAA provides that Initial Orders under the CCAA "shall be limited to the relief reasonably necessary for the continued operations of the debtor company in the ordinary course of business" (*Supra* note 1). Enhanced powers have been granted to monitors in a number of cases (see note 58 of this Brief of Law).

⁶³ 2012 ONSC 3767, 91 CBR (5th) 46.

- a. whether the Monitor supports the KERP agreement and charge (to which great weight was attributed);
- b. whether the employees to which the KERP applies would consider other employment options if the KERP agreement were not secured by the KERP charge;
- c. whether the continued employment of the employees to which the KERP applies is important for the stability of the business and to enhance the effectiveness of the marketing process;
- d. the employees' history with and knowledge of the debtor;
- e. the difficulty in finding a replacement to fulfill the responsibilities of the employees to which the KERP applies;
- f. whether the KERP agreement and charge were approved by the board of directors, including the independent directors, as the business judgment of the board should not be ignored;
- g. whether the KERP agreement and charge are supported or consented to by secured creditors of the debtor; and
- h. whether the payments under the KERP are payable upon the completion of the restructuring process.

Grant Forest Products Inc., Re, 57 C.B.R. (5th) 128 (Ont. S.C.J. [Commercial List]) at para. 8-24 [Grant Forest]; Book of Authorities, Tab 21.

Canwest Publishing Inc./Publications Canwest Inc., Re supra, at paras 59; Book of Authorities, Tab 16.

Canwest Global Communications Corp., Re supra, at para. 49; Book of Authorities, Tab 1.

Timminco Ltd., Re (2012), 95 C.C.P.B. 48 (Ont. S.C.J. [Commercial List]) at paras. 72-75; Book of Authorities, Tab 22.

45. The Key Employees identified in the KEIP, upon being notified of the NALCO Group's intention to liquidate its sheep flock and the winding down of the NALCO Group's operations, are likely to begin the process of seeking alternative employment. The KEIP provides for an incentive payment upon the completion of the NALCO Group's restructuring in order to provide an incentive to the Key Employees to continue in the employ of the NALCO Group during the restructuring and to mitigate the employees' costs of unemployment associated with failing to find alternative employment upon the completion of the restructuring.
46. The Key Employees identified in the KEIP are necessary to ensure that the health and well-being of the NALCO Group's livestock is maintained during these proceedings and to maximize the value of the sheep flock (which will be diminished if the health of the flock is impacted). The Key Employees have specialized knowledge in the niche fields of sheep husbandry and lamb processing. It will be difficult for the NALCO Group to retain individuals familiar with rearing and processing lambs, and there is not sufficient time to train employees to acquire the necessary expertise.
47. The Monitor has been involved in the preparation of the KEIP, views the KEIP as necessary to the continued operation of the NALCO Group and preservation of the sheep flock, and supports both the KEIP and the KEIP Charge. The NALCO Group's senior secured creditors, BNS and FCC, have also been provided with notice of the KEIP and KEIP Charge and both are supportive.
48. The approval of the KEIP and the KEIP Charge are reasonably necessary for the continued operation of the NALCO Group in the ordinary course of business before the matter can be brought back before the Court. There is a strong potential that the NALCO Group's employees could search for new employment upon learning of NALCO Group's insolvency proceedings, and the full benefit of the KEIP is required to incentivize the Key Employees to continue to provide crucial services to the NALCO Group during the restructuring.
49. This Honourable Court has approved Key Employee Incentive Plans and Key Employee Incentive Plan Charges as part of Initial Orders in a number of cases.⁶⁴

⁶⁴ See e.g., *Re Strategic Oil & Gas Ltd.* (10 April 2019), Court File No 1901-05089, Judicial Centre Calgary (Horner J.) [*Strategic Oil & Gas*] and *Re Bellatrix Exploration Ltd.* (2 October 2019), Court File No 1901-13767, Judicial Centre Calgary (Jones J.) [*Bellatrix Exploration*].

50. In the Ontario decision of *Re Clover Leaf Holdings*, Justice Hainey expressly held that the approval of a Key Employee Incentive Plan and Key Employee Incentive Plan Charge in an Initial Order was not inconsistent with section 11.001 of the CCAA.⁶⁵
51. It is standard practice for the details of Key Employee Incentive Plans to be protected by Sealing Orders, as the information contained in such documents comprises confidential and sensitive information regarding the identity and compensation of employees.⁶⁶ The aggregate amount of the KEIP has been disclosed and the individual personal information adds nothing.⁶⁷ The KEIP, like other Key Employee Incentive Plans, contains confidential and sensitive information concerning the Key Employees that should be protected by a sealing order.⁶⁸
52. Therefore, FCM respectfully submits that the approval of the KEIP and the KEIP Charge, and the sealing of the KEIP is necessary and appropriate and should be granted as part of the Initial Order.

E. The Administration Charge is Necessary and Appropriate

53. Section 11.52 of the CCAA authorizes the Court to grant a priority charge in respect of professional fees and disbursements on notice to affected secured creditors.⁶⁹
54. In *Re Canwest Publishing Inc. / Publications Canwest Inc.*,⁷⁰ the Ontario Superior Court of Justice stated that the factors to consider in determining whether to approve an administration charge include:
- a. the size and complexity of the businesses being restructured;
 - b. the proposed role of the beneficiaries of the charge;

⁶⁵ 2019 ONSC 6966 at para 29, 75 CBR (6th) 124.

⁶⁶ See *Re Canwest Global Communications Corp.* (2009), 59 CBR (5th) 72 at para 52 (WL) (Ont Sup Ct J) [*Canwest Global Communications*]; *Re Altus Energy Services Ltd.*, 2011 CarswellAlta 2781 at para 9-12 (QB); *Re Just Energy Group Inc.*, 2021 ONSC 7630 at paras 26-29; *Strategic Oil & Gas*, *supra* note 64 and *Bellatrix Exploration*, *supra* note 64.

⁶⁷ *Canwest Global Communications*, *ibid* at para 52.

⁶⁸ Alexander Affidavit at para 61.

⁶⁹ *Supra* note 1.

⁷⁰ *Re Canwest Publishing Inc. / Publications Canwest Inc.*, 2010 ONSC 222 at para 66, 63 CBR (5th) 115.

- c. whether there is an unwarranted duplication of roles;

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

- d. the position of the secured creditors likely to be affected by the charge; and

- e. the position of the Monitor.⁷¹

55. Courts have recognized that administration charges are often necessary to ensure a debtor company's successful restructuring. For example, in *Re Timminco* ("**Timminco**"), Justice Morawetz (as he then was) stated that failing to provide such charges would "result in the overwhelming likelihood that the CCAA proceedings would come to an abrupt halt, followed, in all likelihood, by bankruptcy proceedings".⁷²
56. The securing of applicant's counsel's fees when the application is brought by a party other than the debtor company is appropriate. The rationale is two-fold. First, securing the applicant's counsel's fees is no more prejudicial to the debtor companies' stakeholders than securing the debtor company's counsel's fees for bringing the application. In both cases, the costs of bringing the application and effect on stakeholder claims should be the same. Second, and related to Justice Morawetz reasoning in *Timminco*, the filing of an application benefits all of a debtor company's stakeholders. No single creditor of debtor companies is likely to commence CCAA proceedings if they are required to bear the entire burden of bringing the application. The securing of counsel's fee's is necessary to ensure that CCAA proceedings are not abortive, and is equally necessary to ensure that CCAA proceedings are brought in first instance.
57. In these proceedings, an Administration Charge is necessary in light of the size and complexity of the restructuring and the necessary involvement of qualified professionals.
58. The NALCO Group requires the knowledge, expertise and continuing participation of the beneficiaries of the proposed Administration Charge in order to successfully restructure in the face of its significant debt. The proposed quantum of the Administration Charge, in the amount of \$700,000, is reasonable in the circumstances.

⁷¹ *Ibid* at para 54.

⁷² *Re Timminco Ltd.*, 2012 ONSC 506 at para 66, 85 CBR (5th) 169.

59. The proposed Monitor has advised in its Pre-Filing Report that such quantum is appropriate in light of the nature of the NALCO Group's operations, the scope of duties of the Monitor, and the scope of duties of counsel to the Monitor, the NALCO Group, and FCM.⁷³
60. The primary secured creditors of the NALCO Group, BNS and FCC, were given notice of the Administration Charge and have expressed their agreement that the Administration Charge is reasonable.
61. For the foregoing reasons, FCM respectfully submits the Administration Charge is necessary and appropriate.

IV. REQUESTED RELIEF

62. FCM respectfully requests that this Honourable Court grant an Initial CCAA Order concerning the NALCO Group substantially in the form attached to its Originating Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5th day of August 2022.

MLT AIKINS LLP



Jeffrey M. Lee, Q.C. and Ryan Zahara, Counsel for the
Applicant, Fresh Meats Canada Ltd.

⁷³ Pre-Filing Report of the Proposed Monitor, Ernst & Young Inc.

INDEX OF AUTHORITIES

TAB	DESCRIPTION
A.	<i>Companies Creditors Arrangement Act</i> , RSC 1985, c C-36.
B.	<i>Miniso International Hong Kong Limited v Migu Investments Inc.</i> , 2019 BCSC 1234, 71 CBR (6th) 250.
C.	<i>Re MJardin Group Inc.</i> , 2022 ONSC 3338.
D.	<i>Re Stelco Inc.</i> (2004), 48 CBR (4th) 299 at para 25-26 (Ont Sup Ct J).
E.	9354-9186 <i>Québec inc. v Callidus Capital Corp.</i> , 2020 SCC 10 at para 49, 444 DLR (4th) 373.
F.	<i>Industrial Properties Regina Limited v Copper Sands Land Corp.</i> , 2018 SKCA 36 at para 34, 422 DLR (4th) 749.
G.	<i>Re First Leaside Wealth Management</i> , 2012 ONSC 1299.
H.	<i>Alberta Treasury Branches v Tallgrass Energy Corp.</i> , 2013 ABQB 432 at para 14, 8 CBR (6th) 161.
I.	Luc Morin and Arad Mojahedi “In Search of a Purpose: The Rise of Super Monitors & Creditor-Driven CCAA’s”, 2019 Ann Rev Insolv 14.
J.	<i>Re 2324159 Alberta Inc.</i> (14 May 2021) Court File Number 2001-05482, Judicial Centre of Calgary, (unreported) (Eidsvik J.).
K.	<i>Re Argent Energy Trust</i> (27 June 2016) Court File Number 1601-01675, Judicial Centre of Calgary, (unreported) (Nixon J.).
L.	<i>Re Broadacre Agriculture Inc.</i> (29 July 2015), Court File Number 1401-11768, Judicial Centre Calgary (unreported) (Dario J.).
M.	<i>Re Port Capital Development (EV) Inc.</i> (20 May 2020), Court File Number No. S-205095 Judicial Centre Vancouver, (unreported) (Fitzpatrick J.).
N.	<i>Re Miniso International Hong Kong Limited</i> (12 July 2019), Court File No S-197744, Judicial Centre Vancouver (Fitzpatrick J.).
O.	<i>Re Gedex Systems Inc.</i> (12 August 2019), Court File Number CV-19-625224-00CL, Judicial Centre Toronto, (unreported) (Penny J.).
P.	<i>Re Cinram International Inc.</i> , 2012 ONSC 3767, 91 CBR (5th) 46.
Q.	<i>Re Strategic Oil & Gas Ltd.</i> (10 April 2019), Court File No 1901-05089, Judicial Centre Calgary (Horner J.)

R.	<i>Re Bellatrix Exploration Ltd.</i> (2 October 2019), Court File No 1901-13767, Judicial Centre Calgary (Jones J.).
S.	<i>Re Clover Leaf Holdings</i> , 2019 ONSC 6966 at para 29, 75 CBR (6th) 124.
T.	<i>Re Canwest Global Communications Corp.</i> (2009), 59 CBR (5th) 72 at para 52 (WL) (Ont Sup Ct J).
U.	<i>Re Altus Energy Services Ltd.</i> , 2011 CarswellAlta 2781 at para 9-12 (QB).
V.	<i>Re Just Energy Group Inc.</i> , 2021 ONSC 7630.
W.	<i>Re Canwest Publishing Inc. / Publications Canwest Inc.</i> , 2010 ONSC 222, 63 CBR (5th) 115.
X.	<i>Re Timminco Ltd.</i> , 2012 ONSC 506, 85 CBR (5th) 169.