Court File No.: CV-22-00688966-00CL

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 THE FLOWR CORPORATION, THE FLOWR CANADA HOLDINGS ULC, THE FLOWR GROUP (OKANAGAN) INC., AND TERRACE GLOBAL INC. (collectively, the "**Applicants**")

FACTUM OF THE APPLICANTS

December 13, 2022

MILLER THOMSON LLP
Scotia Plaza
40 King Street West, Suite 5800
P.O. Box 1011
Toronto ON M5H 3S1

Kyla Mahar LSO#: 44182G
kmahar@millerthomson.com
Tel: 416.597.4303

Patrick Corney LSO#: 65462N
pcorney@millerthomson.com
Tel: 416.595.8555 / Fax: 416.595.8695

Lawyers for the Applicants

PART I - OVERVIEW

1. On October 20, 2022 the Applicants obtained protection under the *Companies Creditors' Arrangement Act,* R.S.C. 1985, c. C-36, as amended (the "**CCAA**") pursuant to an Initial Order granted by the Ontario Superior Court of Justice (Commercial List) (the "**Court**").

2. This factum is filed by the Applicants in support of the Applicants' motion for, among other things, the approval of an Amended and Restated Purchase Agreement (the "**Sale Agreement**") among The Flowr Canada Holdings ULC ("**Flowr Holdings**" or the "**Vendor**"), The Flowr Group (Okanagan) Inc. ("**Flowr Okanagan**" or the "**Purchased Entity**"), and Avant Brands K1 Inc., (formerly 1000343100 Ontario Inc., the "**Purchaser**"), dated as of December 1, 2022, and the going concern sale transaction contemplated thereunder (the "**Transaction**").

3. The Transaction is structured as a reverse vesting order (a "**RVO**") whereby the Purchaser is taking all of the issued and outstanding shares of the Purchased Entity free and clear of all from all Claims and Encumbrances.

4. The RVO structure is necessary to preserve the going concern value of the Applicants' business, which is held largely within Flowr Okanagan. The Applicants are in the business of cannabis production and distribution and hold Licenses issued by Health Canada and the Canada Revenue Agency that permit the Applicants to cultivate, produce, package, and sell cannabis products, as well as administer cannabis for research and testing purposes. The evidence before this Court is that the Licenses, upon which the going concern value of the Applicants' business is reliant, would likely be lost if they were transferred to the

Purchaser by way of a traditional vesting order given the regulatory regime within which the Applicants operate.

5. The Sale Agreement provides the best outcome for their creditors in the circumstances:

(a) It is the highest and best offer generated through a Court-approved and Monitor-implemented sale and investment solicitation process ("**SISP**") and resulting competitive Auction;

(b) It provides certainty that the Applicants will have access to a debtor-in-possession loan facility pursuant to the Applicants' existing DIP Term Sheet, providing such further funding to the Applicants as is reasonably necessary to, among other things, close the Transaction and address Post-Closing Expenses (the "**Closing DIP Loan**");

(c) Closing of the Transaction is based on only on customary conditions and requisite approval; and

(d) The Transaction is more beneficial to the Applicants' stakeholders than a liquidation.

The Sale Agreement and related relief sought in the RVO should therefore be approved.

PART II - SUMMARY OF FACTS

6. The facts supporting this motion are set out in the affidavit of Darren Karasiuk, sworn December 9, 2022 (the "**Karasiuk Affidavit**").[1]

7. Capitalized terms used herein and not defined shall have the meanings ascribed to them under the Karasiuk Affidavit, the Sale Agreement, the SISP Order granted by the Court dated October 28, 2022 (the "**SISP Order**") or the Amended and Restated Initial Order granted by the Court dated October 20, 2022 (the "**ARIO**"), as applicable.

A. The Initial Order

8. By early Autumn 2022, the Applicants were insolvent despite out-of-Court restructuring efforts. On October 20, 2022, the Applicants sought and obtained protection under the CCAA.

9. Under the Initial Order, among other things, Ernst & Young Inc. was appointed as monitor (the "**Monitor**") and the Applicants were authorized to obtain and borrow under a credit facility from 1000343100 Ontario Inc. (in such capacity, the "**DIP Lender**"), provided that borrowings under such credit facility did not exceed $500,000 (the "**DIP Facility**").

10. On October 28, 2022, the Court granted the ARIO. The ARIO, among other things, extended the Stay Period until January 13, 2023, approved a key employee retention plan ("**KERP**") and related charge, and increased the DIP Facility to $2,000,000.

[1] Motion Record of the Applicants dated December 9, 2022 ["**AMR**"], Tab 2, Caselines Master: A930.

B. SISP Order & Stalking Horse Order

11. On October 28, 2022, the Court also granted the SISP Order authorizing the Monitor, in consultation with the Applicants, to conduct the SISP. The SISP Order granted the DIP Lender the exclusive option to submit a Stalking Horse Bid.

12. On October 31, 2022, Flowr Holdings, Flowr Okanagan and the DIP Lender (in that capacity, the "**Stalking Horse Bidder**") finalized negotiations and entered into a stalking horse purchase agreement (the "**Stalking Horse Purchase Agreement**").

13. On November 3, 2022, the Court granted an Order approving the Stalking Horse Purchase Agreement and related Break Fee in the amount of $185,000 (the "**Stalking Horse Order**"). The key terms of the Stalking Horse Purchase Agreement are summarized in the affidavit of Darren Karasiuk sworn October 31, 2022, in support of the Stalking Horse Order (the "**October 31 Affidavit**") and the Monitor's Second Report dated November 2, 2022.[2]

14. Pursuant to the terms of the SISP Order, the Stalking Horse Purchase Agreement, once approved by the Court, was deemed a Qualified Bid under the SISP.

C. The SISP and Resulting Auction

15. Following the issuance of the SISP Order, the Monitor, in consultation with the Applicants, undertook the SISP. The Monitor:

    (a) developed a list of 60 Known Potential Bidders;

[2] Second Report of the Monitor dated November 2, 2022, Caselines Master: E63.

(b) provided a letter to the Known Potential Bidders describing the SISP and the opportunity to purchase or invest in all or part of the Applicants' assets and business operations (the "**Opportunity**");

(c) between November 1 and 4, 2022, gave broad notice of the Opportunity through Global Newswire, The Globe and Mail (National Edition), and the Monitor's Website; and

(d) provided four interested parties access to a data room (following execution of a non-disclosure agreement) and otherwise facilitated due diligence of the Opportunity.[3]

16. On November 25, 2022, the Monitor received a binding offer (the "**260 Ontario Bid**") under the SISP from 2608241 Ontario Inc. ("**260 Ontario**"). The 260 Ontario Bid was determined by the Monitor, in consultation with the Applicants, to be a Qualified Bid. The Monitor also determined that the 260 Ontario Bid was the Lead Bid and advised the two Qualified Bidders that an auction would take place on December 1, 2022 in accordance with the SISP Order.[4]

17. The Auction was held virtually on December 1, 2022, through Microsoft Teams. The Auction was attended by, among others, representatives of the Stalking Horse Bidder and 260 Ontario including their respective legal counsel and financial advisors, representatives

[3] Karasiuk Affidavit, para. 20, AMR Tab 2, Caselines Master A967; Third Report of the Monitor ["**Third Report**"], para. 22 and 25.

[4] Karasiuk Affidavit, para. 21, AMR Tab 2, Caselines Master A967; Third Report, para. 25-31.

of the Applicants including their legal counsel, representatives of the Monitor including their legal counsel and a Court reporter.[5]

18. At the commencement of the Auction, the Stalking Horse Bidder provided its first Overbid. In addition to cash, the Stalking Horse Bidder's opening Overbid included common shares of Avant Brands Inc. ("**Avant Common Shares**"). 260 Ontario advised the Monitor that it was their view that the common shares of Avant Common Shares were not appropriately included as part of the Stalking Horse Bidder's Overbid. In response, the Monitor confirmed that it amended the SISP and advised that parties were permitted to bid with non-cash cash-equivalent consideration and, where such consideration was offered, the Monitor would work with the bidder to value such consideration. Following this discussion, the bidding resumed and over the next seven hours the bidders submitted escalating Overbids.[6]

19. Ultimately, following the Stalking Horse Bidder's third Overbid, and after submitting two Overbids of its own, 260 Ontario withdrew from the Auction. The Stalking Horse Bidder's third Overbid therefore became the Successful Bid and the Auction was concluded.[7]

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[5] Karasiuk Affidavit, para. 25, AMR Tab 2, Caselines Master A968.
[6] Karasiuk Affidavit, para. 26-28, AMR Tab 2, Caselines Master A968; Third Report, paras. 39-60.
[7] Karasiuk Affidavit, para. 28, AMR Tab 2, Caselines Master A969.

D. The Successful Bid and Sale Agreement

20. The Successful Bid consists of total consideration in the amount of $5,115,000 (after taking into account the Break Fee) plus the amount of the Closing DIP Loan and the Assumed Liabilities, as follows:

(i) $4,015,000; plus

(ii) freely tradeable Avant Common Shares with value of $1,100,000 (the "**Avant Share Value**"), which is to be calculated at a 15% discount to the volume weighted average price per Avant Common Share on the Toronto Stock Exchange for the 10 consecutive trading days preceding the Closing Date; plus

(iii) the Closing DIP Loan; plus

(iv) the value of the Assumed Liabilities.[8]

21. Following the Auction, the Purchaser changed its name to Avant Brands K1 Inc. and the Sale Agreement was finalized to reflect the Successful Bid.

22. The Sale Agreement is substantially similar to the Stalking Horse Purchase Agreement described in the October 31 Affidavit. The modifications to this agreement are described in the Karasiuk Affidavit.

23. The Purchase Price under the Sale Agreement will be satisfied through:

[8] Karasiuk Affidavit, para. 29, AMR Tab 2, Caselines Master A969.

(i) a credit bid of the amounts owing to the Purchaser in its capacity as DIP Lender, including the Closing DIP Loan (collectively, the "**Credit Bid**");

(ii) the Avant Share Value;

(iii) an amount in cash equal to the Purchase Price less the Credit Bid, and the Avant Share Value, a portion of which may be payable in non-cash consideration in certain circumstances; and

(iv) the assumption of the Assumed Liabilities.[9]

24. The amount of the cash portion of the purchase price may be reduced if employees with KERP entitlements elect to take Avant Common Shares (issued separately from the Avant Common Shares that form part of the Purchase Price) instead of cash, as a portion of the cash consideration forming the Purchase Price is intended to fund the KERP.[10]

25. Under the Transaction contemplated by the Sale Agreement, the Purchaser will own 100% of the issued and outstanding shares of Flowr Okanagan, following, among other steps, a pre-closing reorganization (the "**Pre-Closing Reorganization**"), which will, among other things:

(a) transfer the Transferred Assets to Flowr Okanagan; and

[9] Karasiuk Affidavit, para. 30, AMR Tab 2, Caselines Master A970.

[10] Karasiuk Affidavit, para 31, AMR Tab 2, Caselines Master A970.

(b) transfer all Excluded Assets and Excluded Liabilities to the newly incorporated 14588495 Canada Inc. ("**ResidualCo**").[11]

26. Following the Pre-Closing Reorganization, Flowr Okanagan will hold only the Retained Assets (including the Transferred Assets, being certain intellectual property relating to the Flowr brand owned by Flowr Holdings) and the Assumed Liabilities.[12]

27. To the extent additional facts are relevant to the issues on this motion, they are referred to in argument below.

PART III - STATEMENT OF ISSUES

28. There are two issues on this motion:

(a) whether the Sale Agreement and Transaction thereunder should be approved, including the RVO, releases, and other related relief; and

(b) whether the Stay Period should be extended.

PART IV - LAW AND ARGUMENT

A. The Sale Agreement and Transaction Should Be Approved

(I) The Reverse Vesting Order is Appropriate

29. A reverse vesting order generally involves a series of steps, whereby:

(a) the purchaser becomes the sole shareholder of the debtor company;

[11] Karasiuk Affidavit, para. 51, AMR Tab 2, Caselines Master A976.
[12] Karasiuk Affidavit, para. 39, AMR Tab 2, Caselines Master A973.

(b) the debtor company retains its assets, including key contracts and licenses; and

(c) the liabilities not assumed by the purchaser are vested out and transferred, together with any excluded assets, into a newly incorporated entity (which are referred to in the RVO as "ResidualCo**.**").[13]

30. Claims against ResidualCo can then be addressed through a distribution order, a bankruptcy or other similar process.

31. The Purchase Price stands in place of the assets and is available to satisfy creditor claims, in whole or in part, in accordance with their pre-existing priority.[14]

32. The jurisdiction to approve a transaction through a reverse vesting order is found in section 11 of the CCAA, which gives this Court broad powers to make Orders that it sees fit, subject to the restrictions set out in the statute. Justice McEwen has recently confirmed that:

> …[t]here is no provision in the CCAA that prohibits a reverse vesting order structure.
>
> (…)
>
> it is settled law that courts have jurisdiction to approve a transaction involving a reverse vesting order. Moreover, courts agree that the factors set out in s. 36(3) of the CCAA should also be considered on a motion to approve a sale, including one involving a reverse vesting order.[15] [Emphasis added.]

[13] *Re Just Energy Group Inc.*, et al., 2022 ONSC 6354 ["***Just Energy***"], para. 27.

[14] *Just Energy, supra* note 13, para. 28.

[15] *Just Energy, supra* note 13, para. 31.

33. The use of RVOs has recently become more prominent. While this Court has cautioned that RVOs should not be the "norm" in restructurings, and should not be used merely because of convenience, they can be an appropriate way for a debtor to sell its business as a going concern where the circumstances justify such a structure.[16]

34. In the recent CCAA proceedings of *Just Energy Group Inc. et. al.*, Justice McEwen followed a two-step analysis when considering whether to approve a sale transaction that was structured as a RVO:

(a) First, whether the RVO was *prima facie* appropriate for use in the case at hand; and

(b) Second, whether the CCAA s. 36/*Soundair* factors supported the sale transaction generally.

35. In *Re Harte Gold*, Justice Penny provided detailed guidance on the circumstances in which an RVO can be appropriate. In December 2021, Ontario gold mining developer Harte Gold Corp. ("**Harte Gold**") commenced proceedings under the CCAA. From the outset, the debtor's plan was to achieve a going-concern sale of its business, with the pre-filing secured lender serving as the stalking horse bidder in a sale process that culminated with the stalking horse bid being declared the winning bid.

36. The stalking horse bid was structured as a share subscription agreement with an RVO. The result was the purchaser became the sole shareholder of Harte Gold's business, which was divested of certain assets, contracts and liabilities that were assigned to a residual

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[16] *Just Energy*, *supra* note 13, para 33; *Re Harte Gold Corp.*, 2022 ONSC 653 ["***Harte Gold***"], para. 38 and 77.

corporation. The RVO structure was argued to be necessary instead of a traditional asset sale approach in order to maintain Harte Gold's multitude of contracts, licences and mining-related claims.

37. In considering whether to approve the RVO, Justice Penny articulated four non-exhaustive factors to provide guidance on the circumstances when an RVO can be appropriate:

(a) why the RVO is necessary;

(b) whether the structure produces an economic result at least as favourable as any other viable alternative;

(c) whether any stakeholder is worse off under the RVO structure than under a viable alternative; and

(d) whether the consideration provided by the acquirer reflects the importance and value of the assets being preserved under the RVO structure.[17]

Justice Penny found that those questions had been favourably addressed and that the sale was otherwise appropriate in the circumstances.[18] He therefore granted the RVO.

38. Similarly, in *Re Just Energy*, Justice McEwen observed that RVOs have previously been approved in cases with circumstances where – like the case at hand – "the debtor operated

[17] *Harte Gold, supra* note 16, para. 38.

[18] *Harte Gold, supra* note 16, para. 77 and 94.

in a highly-regulated environment in which its existing permits, licenses or other rights were difficult or impossible to reassign to a purchaser."[19]

39. Indeed, this Court has previously approved the use of RVOs to facilitate similar transactions involving licensed Cannabis companies: *Beleave Inc. et al. (Re),*[20] *Green Relief,*[21] *Ayanda Cannabis Corporation,*[22] and *Eve & Co Incorporated.*[23]

40. This case fits squarely within the pattern of circumstances where an RVO is appropriate:

(a) the reverse vesting structure will preserve critical Licences necessary for the operation of the purchased business, which Licences Flowr Okanagan would not otherwise be able to transfer in the ordinary course or through a traditional vesting order; it will also minimize regulatory hurdles and decrease closing uncertainty;[24]

(b) the delay, risk, and uncertainties created by a traditional vesting order would result in either a materially decreased purchase price for a going concern transaction, or the liquidation of the Applicants;[25]

(c) there is no competing plan of compromise or arrangement, or other restructuring transaction; and

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[19] *Just Energy, supra* note 13, para. 34.

[20] *Beleave Inc. et al (Re)* (18 September 2020), Toronto CV-20-00642097-00CL (Ont Sup Ct [Commercial List]).

[21] *Green Relief Inc. (Re)*, 2020 ONSC 6837. [***"Green Relief"***]

[22] *In the Matter of the Notice of Intention to Make a Proposal of Ayanda Cannabis Corporation*, (March 1, 2022), Court File No. BK-22—2802344-0035.

[23] *In the Matter of a Plan of Compromise or Arrangement of Eve & Co Incorporated et al.*, (October 7, 2022), Court File No. CV-22-00678884-00CL.

[24] Karasiuk Affidavit, para. 55 and 56, AMR Tab 2, Caselines Master A977-A978.

[25] Karasiuk Affidavit, para. 57, AMR Tab 2, Caselines Master A978.

(d) the Purchase Price was generated through a Court approved SISP implemented by the Monitor, including a competitive Auction against another potential strategic acquirer, and therefore the Purchase Price likely represents the highest possible consideration that a potential acquirer was willing to pay.

(II) The s. 36 Factors Support the Transaction Generally

41. Section 36 of the CCAA provides that a debtor "may not sell or otherwise dispose of assets outside of the ordinary course of business unless authorized to do so by the court."[26] In considering whether to approve a sale, a court should consider, among other things:[27]

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the monitor approved of the process leading up to the proposed sale;

(c) whether the monitor filed a report stating that the sale or disposition would be more beneficial to creditors than a sale or disposition in a bankruptcy;

(d) the extent to which creditors were consulted;

(e) the effects of the proposed sale on creditors and other interested parties; and

(f) whether the consideration to be received is reasonable and fair, taking into account their market value.

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[26] CCAA, s. 36(1).

[27] CCAA, s. 36(3).

42. In *Harte Gold*, Justice Penny held that the s. 36(3) criteria largely correspond to the common law factors applied to the consideration of an asset sale in insolvency, articulated in *Royal Bank of Canada v Soundair Corp*.[28] In *Just Energy*, Justice McEwen held that where a s. 36(3) analysis supports a proposed transaction, *Soundair* is likely satisfied as well.[29]

43. The Applicants submit that the Sale Agreement satisfies the test set out in section 36(3) of the CCAA and *Soundair*, and ought to be approved for the following reasons:

(a) The process leading to the Transaction was reasonable. The Transaction results from the SISP, which involved the Monitor contacting 60 Known Potential Bidders; broad, public notice of the Opportunity; data room due diligence by four Known Potential Bidders; and a competitive Auction where the Successful Bid was the fifth Overbid.

(b) The Monitor approved of the process leading up to the proposed sale. The Monitor was involved in the design of the SISP, oversaw marketing the Opportunity and due diligence regarding same, and conducted the Auction. During the Auction, the Monitor was actively involved in valuing the Overbids.[30]

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[28] *Royal Bank of Canada v Soundair Corp*., [1991] O.J. No. 1137, 4 OR (3d) 1.

[29] *Just Energy, supra* note 13, para. 32 and 62.

[30] Third Report, para. 18-31 and 69.

(c) The Monitor believes that the Transaction will be more beneficial to creditors than a bankruptcy.[31]

(d) Any creditor that has requested, has been included on the Applicants' service list. There is no suggestion in the record that any creditors were ignored or overlooked.

(e) The Transaction is the best available option for the Applicants' going-concern exit from these CCAA Proceedings. The Applicants' evidence, supported by the Monitor, is that the Transaction is in their best interests and those of their stakeholders.[32] Post-closing, the Applicants' business will continue as a going concern and the Purchaser intends to keep all of the operational employees at the K1 Facility.[33] The Transaction is capable of implementation in a timely manner, which will minimize professional fees, and will maximize creditor recoveries.[34] The economic effect of the Transaction on the Applicants' stakeholders will be the same, if not more advantageous, than what would be achieved in an asset sale.[35]

(f) The Purchase Price is fair and reasonable. The Purchase Price under the Sale Agreement is a material improvement over the purchase price under the Stalking Horse Purchase Agreement. In addition, the Closing DIP Loan will be provided by the same entity that is the Applicants' current DIP Lender, which provides certainty of availability and terms. This is important because the most recent Forecast that

[31] Third Report of the Monitor para. 66(g).
[32] Karasiuk Affidavit, para. 42, AMR Tab 2, Caselines Master A974.
[33] Karasiuk Affidavit, para. 45, AMR Tab 2, Caselines Master A974.
[34] Karasiuk Affidavit, paras. 44. and 59, AMR Tab 2, Caselines Master A974 and A978.
[35] Karasiuk Affidavit, para. 41, AMR Tab 2, Caselines Master A973.

the Applicants have prepared with the assistance of the Monitor shows that the Applicants will have cash requirements in excess of those available to them under the DIP Facility once it is fully drawn. The Closing DIP Loan is therefore essential to ensure that the Applicants' cash needs can be funded in order to conclude the Transaction and to undertake the necessary steps to terminate these CCAA Proceedings both before and after the conclusion of the Transaction, and the expenses incurred after the closing of the Transaction.[36]

44. In light of the foregoing, the *Soundair* factors are also met: there was a sufficient effort to obtain the best price; the debtor has not acted improvidently; the interests of the parties have been properly considered; the process has been carried out with efficacy and integrity; and there is no unfairness in the circumstances.

(III) The Related Relief Should Be Granted

45. In addition to seeking approval of the Sale Agreement and Transaction, the Applicants are also seeking the approval of other relief critical to the completion of the Transaction and the orderly and efficient conclusion of these CCAA Proceedings, including, among other things:

(a) adding ResidualCo as an Applicant;

(b) granting the Releases;

(c) granting certain enhanced powers to the Monitor in respect of ResidualCo; and

[36] Karasiuk Affidavit, para. 34, AMR Tab 2, Caselines Master A971.

(d) extending the Stay Period.

ResidualCo Should Be Added as an Applicant

46. In order to consummate the Transaction, ResidualCo must become an Applicant in these CCAA Proceedings. Doing so will allow the Purchaser to acquire all issued and outstanding shares of the Purchased Shares, along with the Purchased Entity Property, free and clear of all Encumbrances (except for Permitted Encumbrances), while allowing the claims of the Applicants' stakeholders to continue against ResidualCo.[37]

47. ResidualCo is a corporation that has been incorporated under the federal laws of Canada. Immediately after the Excluded Assets and Excluded Liabilities are transferred to ResidualCo, ResidualCo will be balance sheet insolvent and the claims against ResidualCo will be in excess of the statutory threshold of $5 million.[38]

48. The Monitor supports adding ResidualCo as an Applicant.

The Releases Should Be Granted

49. The Approval and Vesting Order contains typical broad releases in favour of: (a) the current and former directors, officers, employees, legal counsel and advisors of the Flowr Group and ResidualCo; (b) the Monitor and its legal counsel, and (c) the Purchaser and its current and former directors, officers, employees, legal counsel and advisors ("**Released Parties**").

[37] Karasiuk Affidavit, para. 48, AMR Tab 2, Caselines Master A975.
[38] Karasiuk Affidavit, para. 49, AMR Tab 2, Caselines Master A976.

50. Third party releases have been granted in both CCAA plans and RVO transactions. As the Quebec Court recently noted in *Blackrock Metals*, "it has now become commonplace for third-party releases, in favour of parties to a restructuring, their professional advisors, as well as their directors, officers and others, to be approved outside of a plan of arrangement in the context of a transaction."[39] There are numerous examples where such releases have been granted in RVO transactions.[40]

51. The CCAA expressly contemplates that claims against the directors and officers of a debtor company can be compromised and released in a plan, subject to certain exceptions.[41] The same should apply where a CCAA restructuring does not involve a plan, as this Court has noted: "I do not agree that the absence of a plan deprives the court of jurisdiction to approve a release."[42]

52. The Courts have approved releases in favour of third parties in the absence of a plan of compromise or arrangement, both on consent and in contested matters.[43] Third party releases have also been granted in reverse vesting order transactions.[44]

53. The same test for granting third party releases in a CCAA plan applies to a release in an RVO. The Court must ask: (a) whether the parties to be released were necessary to the

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[39] *Blackrock Metals Inc.*, 2022 QCCS 2828, ["***Blackrock Metals***"] para. 128, citing *Green Relief*, *supra* note 21, para. 23-25; *Re 8640025 Canada Inc*., 2021 BCSC 1826, para. 43.

[40] For example: *Just Energy*, *supra* note 13, para. 67; *Harte Gold*, *supra* note 16, para. 78-86; *Re Clearbeach and Forbes*, 2021 ONSC 5564 at para. 27(f); *Green Relief*, *supra* note 21, para. 23 and 27-29.

[41] CCAA, s. 5.

[42] *Green Relief*, *supra* note 21, para. 23.

[43] See, for example, *Green Relief*, *supra* note 21, and CCAA Termination Order in the Matter of *Golf Town Canada Holdings Inc. et al*, dated March 29, 2018, Toronto, Court File No. CV-16-11527-00CL (ONSC).

[44] See, for example, Approval and Vesting Order, in the Matter of *Wayland Group Corp. et al*, dated April 21, 2020, Toronto, Court File No. CV-19-00632079-00CL (ONSC).

restructuring of the debtor; (b) whether the claims to be released are rationally connected to the purpose of the restructuring and necessary for it; (c) whether the restructuring could succeed without the releases; (d) whether the parties being released contributed to the restructuring; and (e) whether the releases benefit the debtors as well as the creditors generally.[45] It is not necessary for each of these factors to apply in order for the proposed release to be granted.[46]

54. In this case, the proposed Releases should be granted for the following reasons:

(a) The Released Parties have made material contributions to this restructuring. Since the initiation of these CCAA Proceedings, the Released Parties have worked diligently towards, or otherwise facilitated, a going-concern restructuring of the Flowr Group. Such efforts resulted in a successful SISP, a competitive Auction, and the Sale Agreement;[47]

(b) The Releases will benefit the Applicants' creditors and other stakeholders by protecting the Applicants and ResidualCo against potential contribution and indemnity claims, minimizing potential claims against the Applicants, and thus maximizing the proceeds of the Transaction;[48]

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[45] *Blackrock Metals, supra* note 39, citing *Harte Gold*, above at paras. 78-86 and the test established in *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587. See also *Green Relief, supra* note 21, para. 27, citing *Re Lydian International Limited* , 2020 ONSC 4006 at para. 54.

[46] *Green Relief, supra* note 21, para. 28.

[47] Karasiuk Affidavit, para. 63, AMR Tab 2, Caselines Master A979.

[48] Karasiuk Affidavit, para. 64, AMR Tab 2, Caselines Master A979.

(c) The requested Releases are necessary to bring finality to these CCAA Proceedings, facilitate the release of the Court-ordered charges, without requiring a reserve for potential claims which would prevent the Transaction from closing, and to protect the Released Parties from Released Claims, which capture all claims arising prior to the filing of the Monitor's Certificate and

> (a) undertaken or completed pursuant to the terms of [the Approval and Vesting Order], (b) arising in connection with or relating to the Sale Agreement or the completion of the Transaction, (c) arising in connection with or relating to the within these CCAA proceedings, or (d) related to the management, operations or administration of the Applicants;[49]

(d) The Releases are required by the Purchaser as a condition precedent to the Transaction;[50]

(e) The Releases were disclosed in the Applicants' motion materials served on the service list one week in advance of this motion; and

(f) The Monitor supports the granting the Releases.[51]

<u>The Monitor's Powers Should Be Expanded</u>

55. The Applicants are seeking an order expanding the powers of the Monitor to, among other things, take all steps necessary to wind down, dissolve and/or bankrupt ResidualCo and

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[49] *Just Energy* Approval and Vesting Order, dated November 3, 2022.

[50] Karasiuk Affidavit, para. 62 and 65, AMR Tab 2, Caselines Master A979; Sale Agreement, definition of "Approval and Vesting Order" and section 9.1, AMR Tab 2C, Caselines Master A995 and A1012.

[51] Third Report, para. 74.

administer the Excluded Assets and Excluded Liabilities. This relief is intended to facilitate the RVO structure.[52]

56. Similar relief has been granted in other RVO cases.[53]

57. The Monitor has the experience necessary to oversee ResidualCo and it is appropriate to expand the powers of the Monitor in order to complete these CCAA Proceedings.

The Stay Period Should Be Extended

58. The Applicants seek an extension of the Stay Period until February 26, 2023 to allow the Transaction to close.

59. The Applicants have acted with due diligence and in good faith to achieve the Sale Agreement; and will continue to act with due diligence an in good faith to close the Transaction.[54]

60. No creditors will be materially prejudiced by the proposed extension of the Stay Period.[55]

61. The Forecast projects that, with the Closing DIP Loan, the Applicant will have sufficient liquidity to operate through the proposed extended Stay Period.[56]

62. The Monitor supports the proposed extension of the Stay Period.[57]

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[52] Draft Approval and Vesting Order, para 21, AMR Tab 3, Caselines Master A1089.

[53] Just Energy, *supra* note 13, para. 2, 24 and 101; *Harte Gold, supra* note 16, para. 91-93.

[54] Karasiuk Affidavit, para. 72, AMR Tab 2, Caselines Master A981.

[55] Karasiuk Affidavit, para. 73, AMR Tab 2, Caselines Master A981.

[56] Karasiuk Affidavit, para. 74, AMR Tab 2, Caselines Master A982.

[57] Karasiuk Affidavit, para. 75, AMR Tab 2, Caselines Master A982; Third Report, para. 83-85.

PART V - ORDER REQUESTED

63. For the reasons set out herein, the Applicants request that this Court grant the Approval and Vesting Order approving the Sale Transaction in substantially the same form as found at Tab 3 of the Motion Record, and the Ancillary Order in substantially the same form as found at Tab 5 of the Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 13th day of December, 2022.

K Mahar patrick corney

Kyla Mahar and Patrick Corney

MILLER THOMSON LLP
Scotia Plaza
40 King Street West, Suite 5800
P.O. Box 1011
Toronto ON M5H 3S1

Kyla Mahar LSO#: 44182G
kmahar@millerthomson.com
Tel: 416.597.4303

Patrick Corney LSO#: 65462N
pcorney@millerthomson.com
Tel: 416.595.8555 / Fax: 416.595.8695

Lawyers for the Applicants

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Just Energy Group Inc. et. al. v. Morgan Stanley Capital Group Inc. et. al*., 2022 ONSC 6354
2. *Harte Gold Corp. (Re)*, 2022 ONSC 653
3. *Beleave Inc. et al (Re)* (18 September 2020), Toronto CV-20-00642097-00CL (Ont Sup Ct [Commercial List])
4. *Green Relief Inc. (Re)*, 2020 ONSC 6837.
5. *In the Matter of the Notice of Intention to Make a Proposal of Ayanda Cannabis Corporation*, (March 1, 2022), Court File No. BK-22—2802344-0035.
6. *In the Matter of a Plan of Compromise or Arrangement of Eve & Co Incorporated et al*., (October 7, 2022), Court File No. CV-22-00678884-00CL.
7. *Royal Bank of Canada v Soundair Corp*., [1991] O.J. No. 1137, 4 OR (3d) 1.
8. *Arrangement relatif à Blackrock Metals Inc*., 2022 QCCS 2828
9. *CCAA Plan of Arrangement – Clearbeach and Forbes*, 2021 ONSC 5564

SCHEDULE "B"
RELEVANT STATUES

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

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.

R.S., c. C-25, s. 5

Claims against directors — compromise

- **5.1 (1)** A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.

Exception

(2) A provision for the compromise of claims against directors may not include claims that

(a) relate to contractual rights of one or more creditors; or

(b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.

Powers of court

(3) The court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances.

Resignation or removal of directors

(4) Where all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the debtor company shall be deemed to be a director for the purposes of this section.

1997, c. 12, s. 122

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

(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

(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.

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 THE FLOWR CORPORATION *et al*.

Court File No.: CV-22-00688966-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings commenced at Toronto

FACTUM OF THE APPLICANTS
(December 13, 2022)

MILLER THOMSON LLP
Scotia Plaza
40 King Street West
Suite 5800
Toronto Ontario
M5H 3S1, Canada

Kyla Mahar LSO#: 44182G
kmahar@millerthomson.com
Tel: 416.597.4303

Patrick Corney LSO#: 65462N
pcorney@millerthomson.com
Tel: 416.595.8555/Fax: (416) 595 8695

Lawyers for the Applicants