COURT FILE NUMBER	2303 06543	Clerk's stamp
COURT	COURT OF KING'S BENCH OF ALBERTA	
JUDICIAL CENTRE	EDMONTON	
	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 J.W. CARR HOLDINGS LTD., SPRUCE GROVE INDUSTRIAL PARK INC., 272649 ALBERTA LTD., 279896 ALBERTA LTD., GRANDE PRAIRIE PLACE ENTERPRISES (1996) INC., 1170292 ALBERTA LTD. and 627612 ALBERTA LTD.	
APPLICANT	114 DEVELOPMENT LTD.	
DOCUMENT	**BENCH BRIEF OF 114 DEVELOPMENT LTD.**	
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**DLA Piper (Canada) LLP** Barristers and Solicitors Suite 2700, Stantec Tower 10220 - 103rd Avenue Edmonton, AB T5J 0K4 Phone: 780.429.6835 Fax: 780.670.4239 Email: jerritt.pawlyk@dlapiper.com / kevin.hoy@dlapiper.com Attention: Jerritt Pawlyk / Kevin Hoy	

Commercial List Application Scheduled for August 3, 2023

Table of Contents

I. INTRODUCTION

1. 114 Development Ltd. ("**114**") is a property developer. Just over 10% of the issued and outstanding Class "A" Common shares in 114 are held by J.W. Carr Holdings Ltd. ("**Carr Holdings**"), an Applicant debtor in these proceedings. An independent expert business valuator has concluded that the Class "A" Common shares in 114 held by Carr Holdings (the "**Carr 114 Shares**") have no value.

2. The only asset of 114 is an in-progress development of a multi-unit residential construction project (the "**114 Project**") sited in Edmonton, Alberta. Interest rate increases have rendered the 114 Project not commercially viable given its current financing. 114 has determined that it is of commercial necessity to its go-forward viability for it to re-finance its indebtedness. However, a pending refinancing transaction cannot be completed so long as Carr Holdings remains a shareholder of 114.

3. 114 has facilitated the conclusion of a share purchase agreement dated July 31, 2023, (the "**SPA**") between Carr Holdings and the remaining shareholders of 114 for the sale of Carr Holdings' position in 114 for nominal value. The SPA is conditional upon 114 obtaining from this Honourable Court a Sale Approval and Vesting Order (the "**SAVO**") approving the transaction for the sale of the Carr 114 Shares under the SPA (the "**Transaction**").

4. 114 has thus brought forward the instant Application seeking the SAVO and a Sealing Order in respect of confidential commercial information of 114 relevant to the Transaction.

5. Herein, 114 argues that it has standing to seek an Order of this Honourable Court in these proceedings pursuant to section 11 of the *Companies' Creditors Arrangement Act*[1], that the Transaction should be approved pursuant to the test set out in *CCAA* section 36, and that the Sealing Order is necessary to protect the commercial interests of 114 and its stakeholders.

II. ISSUES

6. 114 submits that the following issue is required to be determined by this Honourable Court:

[1] RSC 1985, c C-36, [***CCAA***].

a. Does 114 have standing to seek relief under CCAA s. 11?

b. Should this Court grant the SAVO?

c. Should this Court grant the Sealing Order?

III. FACTUAL BACKGROUND

7. 114 is a property developer. It was incorporated in 2021 for the purpose of developing the 114 Project, the title to which is its only material asset.[2]

8. 100% of the issued and outstanding shares in 114 are held by four shareholders -- namely, Carr Holdings, Profectus Capital Inc., 2340355 Alberta Ltd., and TID Holdings Inc. (collectively, the "**114 Shareholders**"). The current shareholdings in 114 are summarized in the below capitalization table:

Registered Owner	**Number and Class of Shares**
2340355 Alberta Ltd.	549 Class "A" Common
Profectus Capital Inc.	150 Class "A" Common
J.W. Carr Holdings Ltd.	101 Class "A" Common
TID Holdings Inc.	200 Class "A" Common
TID Holdings Inc.	1,900,000 Class II Preferred Non-Voting[3]

9. Carr Holdings concluded an agreement under which Carr Holdings would serve as the guarantor of debts owing by 114 to MCAP Financial Corporation (the "**114 Project Lender**") under a credit facility (the "**114 Project Facility**") used by 114 to finance the construction of the 114 Project.[4]

10. In exchange for accepting the risk of serving as guarantor, Carr Holdings was granted 101 Class "A" Common shares in 114, representing approximately 10% of the total issued and

[2] Affidavit of Ward Fleming, dated July 31, 2023, at para 5 [***Fleming Affidavit***].
[3] *Ibid*, at para 4.
[4] *Ibid*, at para 8.

outstanding Class “A” shares in 114.[5] Carr Holdings did not contribute any capital to 114 in exchange for its receipt of the Carr 114 Shares.[6]

11. The interest rate for the 114 Project Facility is the prime lending rate of the 114 Project Lender, plus 3.05% *per annum*. At present, the applicable interest rate exceeds 10%.[7] The 114 Project is not commercially viable at this interest rate.[8] Accordingly, it is necessary for 114 to complete a refinancing (the “**Re-Fi**”).

12. 114 is in late-stages of discussions with Equitable Bank (the “**Re-Fi Lender**”) to conclude an agreement for the Re-Fi.[9] The Re-Fi Lender is able to advance financing to 114 at a preferable interest rate, being the prime lending minus 0.05%, through a program backed by the Canada Mortgage and Housing Corporation.[10] However, the Re-Fi Lender has represented that it is not able to enter into an agreement for the Re-Fi so long as Carr Holdings remains a shareholder in 114.[11]

13. The 114 Shareholders and 114 are parties to a Unanimous Shareholder Agreement dated April 20, 2021 (the “**114 USA**”).[12] The terms of the 114 USA expressly permit either 114 or a non-defaulting shareholder to purchase the shares of a shareholder whose shares become encumbered by any third-party at a value based on the fair market value for the 114 Project.[13] 114 has determined that enforcing the USA against Carr Holdings would necessitate an Order of this Court lifting the stay of proceedings imposed in respect of Carr Holdings.[14]

14. 114 obtained an appraisal (the “**Appraisal**”) for both the fair market value and liquidation value of the title to the 114 Project.[15] On the basis of the fair market value set out in the Appraisal, the Carr 114 Shares have no value, even before the application of any applicable discounts.[16]

---

[5] *Ibid*, at para 13.
[6] *Ibid*.
[7] *Ibid*, at para 14.
[8] *Ibid*.
[9] *Ibid*, at para 15.
[10] *Ibid*.
[11] *Ibid*, at para 16.
[12] *Ibid*, at para 19.
[13] *Ibid*.
[14] *Ibid*, at para 21.
[15] *Ibid*, at para 22.
[16] *Ibid*, at para 23.

15. 114 has also obtained an independent valuation (the "**Valuation**") for the Carr 114 Shares. The Valuation, which was completed by Jonathan Lacasse, PhD, CBV, of the Edmonton, Alberta office of Grant Thornton LLP, shows that the Carr 114 Shares currently have a "$nil" value. [17]

16. 114 has facilitated the conclusion of a Share Purchase Agreement, dated July 31, 2023, (the "**SPA**") concerning the Transaction. The SPA contemplates the sale of the Carr 114 Shares on a *pro rata* basis to Profectus Capital Inc., 2340355 Alberta Ltd., and TID Holdings Inc. (collectively, the "**Purchasing Shareholders**") in exchange for the nominal purchase price of $10.00 and an indemnity granted in favour of Carr Holdings in respect of any guarantee obligations owing by Carr Holdings in connection with the debts of 114.[18]

17. Prior to the conclusion of the SPA, 114 communicated the rationale for the Transaction to both the Monitor and key stakeholders of Carr Holdings.[19] Copies of the Appraisal and the Valuation were provided to the Monitor and the key stakeholders of Carr Holdings in confidence.[20]

IV. ARGUMENT

A. This Court should grant the SAVO

18. The *CCAA* does not expressly include provisions allowing for a party that is not an applicant debtor to apply for a SAVO. Herein, 114 argues that this Court has the authority under *CCAA* section 11 to permit 114 to seek its instant Application for the SAVO before going on to set out the reasons why the SAVO may be granted in accordance with the test set out in *CCAA* section 36.

i. 114's standing to seek relief under *CCAA* s. 11

19. As is discussed in greater detail below, section 11 of the *CCAA* empowers Canadian courts with the broad authority to make discretionary orders as may be appropriate under the circumstances, subject only to narrow restrictions.

[17] *Ibid*, at para 25.
[18] *Ibid*, at paras 18 and 28.
[19] *Ibid*, at paras 27 and 29.
[20] *Ibid*, at para 29.

20. Standing to bring forward an application under *CCAA* section 11 is not restricted to applicant debtors or court-appointed monitors. Rather, the *CCAA* expressly permits any party with an interest in the *CCAA* proceedings to bring forward an application under *CCAA* section 11:

> 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.[21]

21. The *CCAA* does contain an express definition of the terms "person interested in the matter" or "interested person." *The Dictionary of Canadian Law* defines "interested person" as "[a] person who has a pecuniary or legal interest in or is directly affected by something.[22]" Notably, the definition of "interested person" appears to be broader than the definition of "interested party", which means "[o]ne who has a right, claim, or economic, pecuniary or proprietary interest in some particular matter." [23]

22. As is explained below, the Supreme Court of Canada (the "**SCC**") has consistently stressed that *CCAA* section 11 should be interpreted broadly. Against this backdrop, 114 submits that this Court may look to any of the below factors individually, or in conjunction with each other, to find that 114 is a person interested in the *CCAA* proceedings of Carr Holdings:

a. 114 is the issuer of non-marketable securities held by Carr Holdings;

b. 114 and Carr Holdings are parties to an agreement governing ownership of the Carr 114 Shares -- namely, the 114 USA -- that 114 or its shareholders could otherwise seek to enforce by applying to lift the stay of proceedings against Carr Holdings;

c. 114 is the primary obligor of indebtedness guaranteed by Carr Holdings;

[21] *CCAA*, *supra* note 1, at s 11, emphasis added.
[22] *The Dictionary of Canadian Law*, 5th Ed (Thomson Reuters: Toronto, 2020), *sub verbo* "interested person".
[23] *Ibid*, *sub verbo*, "interested party".

d. a term in the SPA to which 114 and Carr Holdings are both parties expressly provides that 114 is the party responsible for bringing forward the present Application to seek the SAVO.

ii. *CCAA* s. 11 may be used to allow 114 to seek an Order under *CCAA* s. 36

23. The SCC has recognized that Canadian courts are empowered by the broad and expansive language under *CCAA* section 11 to make any order that may be appropriate under the circumstances, subject to few restrictions. In *Century Services Inc. v Canada (Attorney General)*, Justice Deschamps, writing for the majority, stated as follows:

> [67] The initial grant of authority under the *CCAA* empowered a court "where an application is made under this Act in respect of a company . . . on the application of any person interested in the matter, . . . subject to this Act, [to] make an order under this section" (*CCAA*, s. 11(1)). **The plain language of the statute was very broad.**
>
> [68] In this regard, though not strictly applicable to the case at bar, I note that Parliament has in recent amendments changed the wording contained in s. 11(1), making explicit the discretionary authority of the court under the *CCAA*. Thus, in s. 11 of the *CCAA* as currently enacted, a court may, "subject to the restrictions set out in this Act, . . . make any order that it considers appropriate in the circumstances" (S.C. 2005, c. 47, s. 128). **Parliament appears to have endorsed the broad reading of *CCAA* authority developed by the jurisprudence**.[24]

24. The SCC recently reiterated the foregoing conceptualization of *CCAA* section 11 in *9354-9186 Québec inc. v Callidus Capital Corp*., stating as follows:

> [48] **The CCAA capitalizes on this positional advantage by supplying supervising judges with broad discretion to make a variety of orders that respond to the circumstances of each case and "meet contemporary business and social needs"** (Century Services, at para. 58) in "real-time" (para. 58, citing R. B. Jones, "The Evolution of Canadian Restructuring: Challenges for the Rule of Law", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2005*…. The anchor of this discretionary authority is s. 11, which empowers a judge "to make any order that [the

[24] *Century Services Inc. v Canada (Attorney General)*, 2010 SCC 60, at paras 67 - 68, emphasis added, [***Century Services***].

> judge] considers appropriate in the circumstances". This section has been described as "the engine" driving the statutory scheme…
>
> [49] The discretionary authority conferred by the CCAA, while broad in nature, is not boundless. This authority must be exercised in furtherance of the remedial objectives of the CCAA, which we have explained above (see *Century Services*, at para. 59). Additionally, the court must keep in mind three "baseline considerations" (at para. 70), which the applicant bears the burden of demonstrating: (1) that the order sought is appropriate in the circumstances, and (2) that the applicant has been acting in good faith and (3) with due diligence (para. 69).
> …
>
> [67] Courts have long recognized that s. 11 of the CCAA signals legislative endorsement of the "broad reading of CCAA authority developed by the jurisprudence" (Century Services, at para. 68). …
>
> **On the plain wording of the provision, the jurisdiction granted by s. 11 is constrained only by restrictions set out in the CCAA itself, and the requirement that the order made be "appropriate in the circumstances".**
>
> [68] Where a party seeks an order relating to a matter that falls within the supervising judge's purview, and for which there is no CCAA provision conferring more specific jurisdiction, s. 11 necessarily is the provision of first resort in anchoring jurisdiction. As Blair J.A. put it in Stelco, s. 11 "for the most part supplants the need to resort to inherent jurisdiction" in the CCAA context (para. 36).[25]

25. 114 submits that appropriate circumstances exist for this Court to empower it to seek the SAVO under *CCAA* section 36,. Specifically, Carr Holdings, which would have been in a position to seek an order approving the Transaction directly under *CCAA* section 36, has agreed to sell the Carr 114 Shares to the Purchasing Shareholders on the condition that 114 undertake the necessary steps to obtain the SAVO.

26. Nothing in the *CCAA* expressly prohibits an interested person that is not an applicant debtor from seeking an order approving a transaction for an applicant debtor's property. That *CCAA* section 36 expressly contemplates an application for an order approving the sale of a debtor company's business assets being brought by an applicant debtor (as opposed to a third party) should not serve as an impediment to an Order permitting at third-party to apply for the approval of a transaction. *Per* the SCC in *Century Services*,

[25] *9354-9186 Québec inc. v Callidus Capital Corp.*, 2020 SCC 10, at paras 48-49 and 67-68.

"[t]he general language of the CCAA should not be read as being restricted by the availability of more specific orders."[26]

27. In summary, appropriate circumstances exist for 114 to bring forward an application seeking the approval of the Transaction. Nothing in the *CCAA* expressly prohibits a third-party from seeking an Order approving a transaction entered into by an Applicant debtor. Accordingly, 114 submits that this Court should find that 114 may seek the approval of the Transaction under *CCAA* section 36.

iii. The Transaction may be approved under *CCAA* section 36

28. *CCAA* section 36(1) provides that an applicant debtor may not dispose of its assets outside of the ordinary course of business absent court approval:

> 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.[27]

29. If a court authorizes a transaction, it is expressly empowered by *CCAA* section 36(6) to order that assets sold with Court approval are vested in a purchaser free and clear of any security, charges, or other restrictions.[28]

30. As the Transaction is not made between related persons within the meaning of *CCAA* section 36(5), this Court may approve the transaction provided it is satisfied that secured creditors likely to be affected by the Transaction have been given notice of 114's instant Application and that the Transaction is appropriate in contemplation of the following non-exhaustive list of factors set out at *CCAA* section 36(3)

> **36(3) Factors to be considered**
> In deciding whether to grant the authorization, the court is to consider, among other things,

[26] *Century Services*, *supra* note 24, at para 70.
[27] *CCAA*, *supra* note 1, at ss 36(1).
[28] *Ibid*, at ss 36(6).

(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.

31. Respecting factor (a), the process leading to the conclusion of the SPA was reasonable, under the circumstances. The Carr 114 Shares are non-tradable securities subject to transfer restrictions, inclusive of rights of first refusal of 114 and actionable provisions in the 114 USA that would permit 114 or the Purchasing Shareholders to seek to lift the stay for the purpose of forcing the sale of the Carr 114 Shares to the Purchasing Shareholders at nominal value. Consequently, no benefit would have been derived from attempting to market the Carr 114 Shares to third parties.

32. Respecting factor (b), the Monitor is supportive of the Transaction and was kept consistently apprised of the process leading to the conclusion of the SPA.[29]

33. Respecting factor (d), 114 contacted all key stakeholders of Carr Holdings potentially impacted by the Transaction to both explain the rationale for a nominal value of the Transaction and to share the Appraisal and the Share Valuation in confidence.[30]

34. Respecting factor (e), the Carr 114 Shares have no inherent value at present. Given that the 114 Project will remain uneconomic without the completion of the Re-Fi (which requires Carr Holdings' exit as a shareholder in 114), it is unlikely that will have any value at any point. Accordingly, the completion of the Transaction can have no material adverse effect on Carr Holdings or any of its stakeholders.

[29] Fleming Affidavit, at para 27.
[30] Fleming Affidavit, at para 29.

35. Respecting factor (f), the consideration for the Carr 114 Shares, which consists of a nominal payment and a comprehensive indemnity for guarantee liability granted in favour of Carr Holdings by both 114 and the Purchasing Shareholders is reasonable under the circumstances. 114 reiterates that the Share Valuation concludes that the Carr 114 Shares are of $nil value.

36. In light of the foregoing, 114 submits that the Transaction is reasonable under the circumstances and that the test for its approval under *CCAA* section 36 is made out. Accordingly, this Court should grant the SAVO.

B. This Court should grant the temporary Sealing Order

37. The applicable test for obtaining a sealing order was established in the SCC's decision in *Sierra Club of Canada v. Canada (Minister of Finance)*[31]. When assessing whether a sealing order should be granted, the Court should consider whether:

> (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.[32]

38. The SCC revisited the *Sierra Club* test in *Sherman Estate v Donovan*, where it emphasized the importance of open courts and stated a party seeking to seal court records must establish that:

> (1) court openness poses a serious risk to an important public interest;
>
> (2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,

[31] *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [***Sierra Club***].
[32] *Ibid*, at para 53.

(3) as a matter of proportionality, the benefits of the order outweigh its negative effects.[33]

39. In the present case, the Confidential Exhibits to the Fleming Affidavit contain financial particulars speaking relating to the anticipated fair market value and forced liquidation value for the 114 Project. Disclosure of such particulars at this time would jeopardize the integrity of any potential sales process for the 114 Project in the event that one becomes required should 114 enter into its own insolvency proceedings or become subject to mortgage enforcement proceedings

40. The Sealing Order sought by 114 is temporary, lasting only through to the end of 2023 or the subsequent Order of this Court.

V. CONCLUSION

41. In light of all of the foregoing, 114 respectfully submits that this Honourable Court should grant the SAVO and the Sealing Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 31st day of July, 2023.

DLA PIPER (CANADA) LLP

Per: ______________________

Jerritt Pawlyk and Kevin Hoy,
Counsel to 114 Development Ltd.

[33] *Sherman Estate v Donovan*, 2021 SCC 25 at para 38.

VI. INDEX OF AUTHORITIES

TAB 1 *Century Services Inc. v Canada (Attorney General)*, 2010 SCC 60

TAB 2 *9354-9186 Québec inc. v Callidus Capital Corp.*, 2020 SCC 10

TAB 3 *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41

TAB 4 *Sherman Estate v Donovan*, 2021 SCC 25