Court File No.: CV-24-00712687-00CL

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 THE COMPROMISE OR ARRANGEMENT OF 9869247 CANADA LIMITED (d.b.a. SAFARI FLOWER COMPANY) AND GN VENTURES LTD.

Applicants

FACTUM OF THE APPLICANTS
(Comeback Hearing)

January 19, 2024

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I. INTRODUCTION

1. The Applicants, 9869247 Canada Limited (d.b.a. Safari Flower Company) ("**Safari Flower**") and GN Ventures Ltd. ("**GN Ventures**") (collectively, the "**Safari Flower Group**" or the "**Applicants**") carry on business as a licenced cultivator and processor of cannabis with operations in the Fort Erie region of Ontario. The Safari Flower Group owns and operates a state-of-the-art, 59,000 square foot indoor facility (the "**Stevensville Facility**").

2. As a result of financial issues faced by the Applicants, the Applicants brought an application to the Court on January 12, 2024 for, among other things, protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended ("**CCAA**").

3. The Honourable Justice Osborne granted an order dated January 12, 2024 pursuant to the CCAA (the "**Initial Order**") in favour of the Applicants. Pursuant to the Initial Order, the Court, among other things:

   (a) declared that the Applicants are companies to which the CCAA applies;

   (b) provided a stay of proceedings in favour of the Applicants and their directors and officers up to and including January 22, 2024 (the "**Initial Stay Period**");

   (c) appointed Ernst & Young Inc. ("**EY**") as monitor of the Applicants in these proceedings ("**Monitor**");

   (d) granted an administration charge in the amount of $150,000 in favour of counsel for the Applicants, the Monitor, and the Monitor's counsel (the "**Administration Charge**") over the Applicants' assets;

(e) granted a charge in favour of the Applicants' directors and officers in the amount of $61,000 (the "**Director's Charge**") over the Applicants' assets; and

(f) scheduled a comeback hearing returnable January 22, 2024 (the "**Comeback Hearing**").[1]

4. As the Initial Stay Period expires on January 22, 2024, the Applicants bring this motion in accordance with the Initial Order for the following relief:

(a) an amended and restated initial order (the "**ARIO**") substantially in the form attached as Tab 3 to the Applicants' Motion Record, which provides, among other things:

(i) extending the stay of proceedings granted pursuant to the order, dated January 12, 2024 (the "**Initial Order**"), to and including February 29, 2024;

(ii) approving an increase to the Administration Charge to the maximum amount of $350,000;

(iii) approving an increase to the Director's Charge to the maximum amount of $243,000; and

(iv) approving the execution by the Applicants of a debtor-in-possession term sheet (the "**DIP Term Sheet**"), with NE SPEC II LP on behalf of a company to be incorporated (the "**DIP Lender**"), pursuant to which the DIP Lender has agreed to advance to the Applicants a maximum principal amount of up to $1,000,000 (the "**DIP Facility**") on the terms of the DIP Term Sheet,

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1 Affidavit of Dr. Leanne Brigitte Simons ("**Simons**"), sworn January 19, 2024 (the "**Second Simons Affidavit**"), para. 7.

which will be made available to the Applicants during these CCAA Proceedings.[2]

5. The relief, including the approval of the DIP Facility and the DIP Lender's Charge, is necessary to finance the ongoing operations of the Applicants and their restructuring activities during the CCAA Proceedings, including the consummation of a sale transaction with one of the Applicants' secured lenders.[3] The Applicants intend to return to Court at a subsequent date to seek approval of a share purchase transaction by way of a credit bid, including the granting of a reverse vesting order.[4]

6. The relief being sought is supported by the Monitor and the Applicants' secured lenders and would allow the Applicants to remain as a going concern until the approval and completion of the proposed sale transaction.

7. For these and additional reasons set out in greater detail below, the Applicants submit that the relief sought at the Comeback Motion is fair, reasonable, and will help advance these CCAA Proceedings for the benefit of all the Applicants' stakeholders.

II. FACTS

8. The facts underlying this Application are more fully set out in the affidavits of Dr. Leanne Brigitte Simons ("**Simons**"), sworn January 11, 2024 (the "**First Simons Affidavit**") and January 19, 2024 (the "**Second Simons Affidavit**"). Dr. Simons is President and Chief Executive Officer of the Applicants, and a member of the board of directors.[5]

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[2] Second Simons Affidavit, para. 1.

[3] Second Simons Affidavit, paras. 18-22.

[4] Second Simons Affidavit, para. 12.

[5] Affidavit of Dr. Simons sworn January 11, 2024 (the "**First Simons Affidavit**"), paras. 42 – 44.

III. ISSUES PRESENTED

9. The issues to be addressed before this Honourable Court in respect to the relief being sought under the ARIO are whether:

(a) the Stay Period should be extended to and including February 29, 2024;

(b) the DIP Term Sheet should be approved, pursuant to which the Applicants should be permitted to draw up to the amount of $1,000,000, and whether the DIP Charge should be granted;

(c) this Court should grant and increase the priorities and amounts, as applicable, of the Charges against the Property.

IV. LAW AND ARGUMENT

A. The Stay Period Should be Extended

10. The Initial Order provided for a Stay Period up to and including January 22, 2024. The proposed ARIO seeks to extend the Stay Period to February 29, 2024.

11. Section 11.02(2) of the CCAA gives this Court the authority to grant an extension of the Stay Period for any period "it considers necessary."[6] To do so, this Court must be satisfied that circumstances exist that make the order appropriate and that the Applicants have acted, and are acting, in good faith and with due diligence.[7] A stay of proceedings is appropriate to provide a debtor with breathing room while it seeks to emerge from the CCAA.[8]

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[6] s. 11.02(2)(a), CCAA.
[7] s. 11.02(3), CCAA.
[8] *Ted Leroy Trucking [Century Services] Ltd. (Re)*, 2010 SCC 60, at para 14.

12. The Applicants have acted and are continuing to act in good faith and with due diligence. Since the granting of the Initial Order, the Applicants have communicated with employees and stakeholders following the initial filing, and complied with statutory notices, mailings and communications.[9]

13. The Applicants have also, with the assistance of the Monitor, have negotiated and entered into the DIP Term Sheet with its secured creditor, NE SPC II LP.[10]

14. The Applicants have been working diligently to stabilize and continue operations.

15. The Applicants believe the extension of the Stay Period to and including February 29, 2024, is necessary and appropriate in the circumstances. The requested extension of the Stay Period will provide the Applicants with the breathing space and operational stability to continue operations while working towards entering into a share purchase agreement with one of the Secured Lenders. This will maximize value for the benefit of stakeholders through the CCAA Proceedings.[11]

16. The Monitor and the DIP Lender are both supportive of the proposed extension of the Stay Period.[12]

[9] Second Simons Affidavit, at para. 8.
[10] Second Simons Affidavit, at para. 9.
[11] Second Simons Affidavit, at para. 12.
[12] First Affidavit, at para. 39.

B. The DIP Term Sheet and DIP Lender's Charge Should be Approved

17. Pursuant to the cash flow forecast prepared by the Applicants, with the assistance of the Monitor, for the 7 weeks ending March 17, 2024, the Applicants requires funding to ensure the continuation of operations through the Stay Period.[13]

18. To facilitate this funding requirement, the DIP Lender has agreed to provide a loan up to $1,000,000 ("**DIP Loan**") pursuant to the DIP Term Sheet between the Applicants and the DIP Lender.[14]

19. The Applicants, in consultation with their legal and financial advisors, have entered into the DIP Term Sheet in order to provide the necessary liquidity to continue their operations.[15]

20. The DIP Loan is conditional on court approval of the DIP Loan and charge in favour of the DIP Lender in the amount of $1,000,000 ("**DIP Lender's Charge**").[16]

21. The Applicants are requesting approval of the DIP Term Sheet and DIP Lender's Charge such that they have sufficient funding in place in order to complete their negotiations with the Secured Lenders and complete a share purchase transaction.[17]

22. Section 11.2 of the CCAA provides the Court with the statutory authority to approve the DIP Term Sheet, the DIP Lender's Charge, and that the DIP Lender's Charge rank in priority over the claim of any secured creditor of the company.[18] Section 11.2(4) sets out

[13] Second Simons Affidavit, at para. 11.
[14] Second Simons Affidavit, at para. 9; Exhibit B.
[15] Second Simons Affidavit, at para. 21.
[16] Second Simons Affidavit, Exhibit B.
[17] Second Simons Affidavit, at para. 21.
[18] s. 11.2, CCAA

the following factors to be considered by the Court in deciding whether to grant a super-priority charge in respect of the DIP Charge:

(a) the period during which the company is expected to be subject to proceedings under this Act;

(b) how the company's business and financial affairs are to be managed during the proceedings;

(c) whether the company's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

(e) the nature and value of the company's property;

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the monitor's report.[19]

23. In *Canwest Publishing*, Justice Pepall highlighted the importance of meeting the criteria set out in section 11.2(1) in addition to those found in section 11.2(4), namely:

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

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[19] s. 11.2(4), CCAA.

(b) whether the amount to be granted under a DIP charge is appropriate and required having regard to the debtors' cash-flow statement; and

(c) whether the DIP charge secures an obligation that existed before the order approving the DIP was made.[20]

24. The criteria from sections 11.2(1) and 11.2(4) of the CCAA support approving the DIP Term Sheet and granting the DIP Lender's Charge on the terms sought in the Initial Order, for the following reasons:

(a) The DIP Loan is being advanced by one of the Secured Lenders on notice to the other Secured Lender, which is not opposed. Accordingly, the notice requirements under section 11.2(1) of the CCAA have been satisfied;

(b) the DIP Term Sheet is necessary for the Applicants to pursue their restructuring efforts, which will preserve the business of the Safari Group as a going-concern for the benefit of all its stakeholders;

(c) without the DIP Loan, the Applicants will run out of available funds will not be able to continue operating;

(d) the DIP Lender has indicated that it is only prepared to advance the proposed DIP financing if the DIP Lender's Charge is granted;

(e) the quantum of the DIP Term Sheet is reasonable and appropriate having regard to the Cash Flow Forecast; and

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[20] CCAA, s. 11.2(1); *Canwest Publishing*, 2010 ONSC 222, at paras. 42-44.

(f) the Monitor is supportive of the approval of the DIP Term Sheet and corresponding DIP Lender's Charge.[21]

25. As demonstrated in the First Simons Affidavit, the Applicants are currently facing a liquidity crisis.[22] As the Cash Flow Forecast indicates, the Applicants should have sufficient liquidity to operate through the proposed extension of the Stay Period if the DIP Facility is approved to the maximum amount of $1,000,000; otherwise the Applicants will be unable to fund their operations.[23]

C. Priority and Increase to Court-Ordered Charges

26. The Initial Order granted the Administration Charge in the amount of $150,000 and the Directors' Charge in the amount of $61,000 (collectively, the "**Charges**"), ranking in priority to all other security interests and other encumbrances.

27. The Applicants now seek the Court's approval to increase the Charges in the amounts as follows:

(a) the Administration Charge to $350,000; and

(b) the Directors' Charge to $243,000

28. As previously noted, the Applicants also seek approval of the DIP Loan Charge, on the basis that the Charges and the DIP Loan Charge would have the following priorities:

(a) first - |the Administration Charge ($350,000);

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[21] First Report, at para. 36.
[22] First Simons Affidavit, at para. 9
[23] Second Simons Affidavit, at paras. 11, 19; First Report, at para. 31.

(b) second - the DIP Lender's Charge ($1,000,000); and

(c) third - the Directors' Charge ($243,000).

29. The Court may grant an administration charge pursuant to section 11.52 of the CCAA.[24] The Professionals Group will play a critical role in assisting the Applicants with the negotiations and completion of a transaction with one of the Secured Lenders and these CCAA proceedings. The Administration Charge of $350,000 is reasonable and necessary and is line with the nature and size of the Applicants' business and the involvement required by the Professionals Group for the Stay Period, while maintaining the least amount of prejudice to the Secured Lenders. The Monitor supports the Administration Charge sought by the Applicants.[25]

30. Pursuant to section 11.51 of the CCAA, the Court has specific authority to grant a "super priority" charge to the directors and officers of a company as security for the indemnity provided by the company in respect of certain statutory obligations.[26] Directors of Canadian companies can be held liable for certain obligations of a company owing to employees and government entities. The Applicants, with the assistance of EY in its capacity as Monitor, estimate that these obligations may amount to as much as $243,000.

31. The Applicants propose that the increased Directors' Charge would rank behind the Administrative Charge and DIP Lender's Charge.

[24] s 11.52, CCAA.

[25] Second Simons Affidavit, at para. 19; First Report, at para. 27.

[26] s. 11.51; *Canwest Global*, at para 48.

32. The continued involvement of the Applicants' Directors' Charge is important for the continuity of the business of the Safari Group and the completion of a transaction. Therefore, it is appropriate for the Applicants to increase the Directors' Charge and have a third-priority Directors' Charge over the Property in the amount of $243,000 to secure the indemnity granted by the Applicants in favour of the directors and officers.

33. While the Safari Flower Group's directors and officers have the benefit of a directors and officers insurance policy that provides them with coverage for certain claims and liabilities that may arise, the policy contains exclusions and exceptions to such coverage.[27]

34. The Monitor supports the Administration Charge sought by the Applicants.[28]

35. The Applicants respectfully submit that an increased Directors' Charge is reasonable in the circumstances. Accordingly, the Applicants request that this Court exercise its discretion to approve the increase to the Directors' Charge.

V. RELIEF REQUESTED

36. Based on the foregoing, the Applicants respectfully submit that this Honourable Court grant the ARIO in the form requested in accordance with the provisions of the CCAA.

[27] First Simons Affidavit, at para. 153.

[28] First Report, at para. 30.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 19th day of January, 2024.

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SCHEDULE "A"
LIST OF AUTHORITIES

1. *Canwest Publishing Inc, Re*, 2010 ONSC 222

2. *Canwest Global Communications Corp. (Re)*, [2009] OJ No 4286 (Ont Sup Ct J [Commercial List])

3. *Ted Leroy Trucking [Century Services] Ltd. (Re)*, 2010 SCC 60

SCHEDULE "B"
RELEVANT STATUTES

***Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended**

Stays, etc. — initial application

- 11.02 **(1)** A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 10 days,
    - **(a)** staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;
    - **(b)** restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
    - **(c)** prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.
- **Stays, etc. — other than initial application**

  (2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,
    - **(a)** staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);
    - **(b)** restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
    - **(c)** prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.
- **Burden of proof on application**

  (3) The court shall not make the order unless
    - **(a)** the applicant satisfies the court that circumstances exist that make the order appropriate; and

- **(b)** in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

- **Restriction**

  (4) Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

- 2005, c. 47, s. 128, 2007, c. 36, s. 62(F)
- 2019, c. 29, s. 137

Interim financing

- **11.2** **(1)** On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

- **Priority — secured creditors**

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

- **Priority — other orders**

  (3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

- **Factors to be considered**

  (4) In deciding whether to make an order, the court is to consider, among other things,

  - **(a)** the period during which the company is expected to be subject to proceedings under this Act;

  - **(b)** how the company's business and financial affairs are to be managed during the proceedings;

- **(c)** whether the company's management has the confidence of its major creditors;
- **(d)** whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
- **(e)** the nature and value of the company's property;
- **(f)** whether any creditor would be materially prejudiced as a result of the security or charge; and
- **(g)** the monitor's report referred to in paragraph 23(1)(b), if any.

- **Additional factor — initial application**

  (5) When an application is made under subsection (1) at the same time as an initial application referred to in subsection 11.02(1) or during the period referred to in an order made under that subsection, no order shall be made under subsection (1) unless the court is also satisfied that the terms of the loan are limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

- 1997, c. 12, s. 124
- 2005, c. 47, s. 128
- 2007, c. 36, s. 65
- 2019, c. 29, s. 138

Security or charge relating to director's indemnification

- **11.51** **(1)** On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

- **Priority**

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

- **Restriction — indemnification insurance**

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

- **Negligence, misconduct or fault**

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

- 2005, c. 47, s. 128
- 2007, c. 36, s. 66

Court may order security or charge to cover certain costs

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

- **Priority**

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

- 2005, c. 47, s. 128
- 2007, c. 36, s. 66

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