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, TERRACE GLOBAL INC. AND 14588495 CANADA INC.
(collectively, the "**Applicants**")

FACTUM OF THE APPLICANTS
(returnable January 30, 2024)

Dated: January 29, 2024

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TO: THE SERVICE LIST

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PART I - INTRODUCTION

1. This factum is filed by The Flowr Corporation ("**Flowr**"), The Flowr Canada Holdings ULC ("**Flowr Holdings**"), Terrace Global Inc. and 14588495 Canada Inc. ("**ResidualCo**" and collectively, the "**Flowr Group**" or the "**Remaining Applicants**"), in support of their motion for a CCAA Termination Order substantially in the form found at Tab 2 to the Motion Record (the "**CCAA Termination Order**"), *inter alia*:

(a) approving the Fourth Report of Ernst & Young Inc., in its capacity as monitor of the Remaining Applicants (the "**Monitor**" or "**EY**") dated January 27, 2023 (the "**Fourth Report**") and the Seventh Report of the Monitor dated January 24, 2024 (the "**Seventh Report**"), and the activities, conduct and decisions of the Monitor set out therein;

(b) approving the fees and disbursements of the Monitor and its legal counsel, Thornton Grout Finnigan LLP, as described in the Seventh Report and the fee affidavits appended thereto (the "**Fee Affidavits**") including the estimate of fees to the conclusion of these CCAA Proceedings (the "**Fee Estimates**");

(c) terminating the Remaining Applicants' CCAA Proceedings, effective upon the Monitor serving a certificate substantially in the form of Schedule "A" to the CCAA Termination Order (the "**Termination Certificate**") on the Service List in these CCAA Proceedings (the "**CCAA Termination Time**");

(d) effective at the CCAA Termination Time:

(i) terminating, releasing and discharging the Charges as defined in the Initial Order;

(ii) discharging EY as Monitor of the Remaining Applicants; and

(iii) releasing EY from any and all liability that EY has or may have by reason of, or in any way arising out of, the acts or omissions of EY while acting in its capacity as Monitor of the Remaining Applicants, save and except for any gross negligence or wilful misconduct on the Monitor's part; and

(e) extending the Stay Period from January 31, 2024 up to and including the CCAA Termination Time.

2. On October 20, 2022, Flowr, Flowr Holdings, Terrace Global Inc., and The Flowr Group (Okanagan) Inc. ("**Flowr Okanagan**") were granted creditor protection under the *Companies' Creditors Arrangement Act* ("**CCAA**") by the Ontario Superior Court of Justice (Commercial List) (the "**Court**") pursuant to an Initial Order (as amended and restated, the "**Amended and Restated Initial Order**").

3. On October 28, 2023, a sale and investment solicitation process ("**SISP**") was approved by the Court, which was thereafter undertaken by the Monitor. The SISP resulted in an amended and restated Stalking Horse Purchase Agreement dated December 1, 2022 (the "**Sale Agreement**") being entered into between the Vendor, Flowr Okanagan and Avant Brands K1 Inc. (formerly, the Stalking Horse Bidder) (the "**Purchaser**") as the Successful Bid.

4. On December 16, 2022, the Court granting an order (as amended and restated, the "**Approval and Vesting Order**"), which, among other things (i) approved the Sale Agreement, (ii) approved the addition of ResidualCo as an Applicant, (iii) approved the termination of the CCAA Proceedings in respect of Flowr Okanagan upon the closing of the Transaction, and (iv) expanded the Monitor's powers.

5. The Transaction closed on February 2, 2023. Following the closing of the Transaction, the Remaining Applicants have no further operations. The Monitor's powers were expanded to wind-down the Remaining Applicants and complete the administration of these CCAA Proceedings.

6. As part of the wind down of these CCAA Proceedings, the Remaining Applicants submit that they, and the Monitor, have complied with their obligations and carried out their responsibilities under the CCAA and the Orders granted by this Honourable Court.

7. As set out below, there are limited remaining post-Closing matters to be addressed in the CCAA Proceedings. As such, the Remaining Applicants' submit that termination of the CCAA Proceedings upon the service of the Termination Certificate on the Service List,

and simultaneous discharge and release of the Monitor is appropriate and reasonable in the circumstances.

PART II - THE FACTS

8. Capitalized terms used herein and not defined shall have the meanings ascribed to them in the Initial Order, the Fourth Report or the Seventh Report.[1]

9. The full set of facts in support of the Remaining Applicants' Motion can be found in the Seventh Report.

A. Background of the CCAA Proceedings

10. The Flowr Group was a licenced producer and distributor of cannabis with its head office being located in Toronto, Ontario and its operations being located in Kelowna, British Columbia. The Flowr Group, through Flowr Okanagan, was licensed by Health Canada to sell cannabis products.

11. On December 16, 2022, the Court granted the Approval and Vesting Order, which was amended and restated on January 30, 2024, which, among other things, approved the Sale Agreement.[2]

12. The Sale Agreement contemplated a sale of all of the issued and outstanding common shares of Flowr Okanagan following the implementation of a Pre-Closing Reorganization (i.e., a reverse vesting structure as described in the Sale Agreement) (the "**Transaction**").[3]

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[1] A copy of the Initial Order, Amended and Restated Initial Order, and all documents filed in the within CCAA proceedings can be found on the Monitor's website.

[2] Seventh Report of the Monitor dated January 24, 2024 (the "**Seventh Report**"), at para 5.

[3] Seventh Report, at para 5.

13. The purchase price of the Transaction (the "**Purchase Price**") was the sum of $5,115,000 plus the amount of the Closing DIP Loan (to the extent not repaid) and the Assumed Liabilities (both as defined in the Sale Agreement).[4]

14. The Sale Agreement permitted the payment of $1.1 million of the Purchase Price in the form of free-trading common shares of Avant Brands Inc. (ticker symbol, AVNT.TO) (the "**Avant Shares**"). In connection with the Closing, the Remaining Applicants received 6,337,117 Avant Shares that were calculated at a 15% discount to the volume weighted average price per Avant Share on the Toronto Stock Exchange for the 10 consecutive trading days preceding the Closing.[5]

15. In addition, certain KERP participants elected to receive their KERP payments in the form of Avant Shares, resulting in the direct issuance of Avant Shares with a cash equivalent value of $165,000 to these individuals.[6]

16. After the Closing on February 2, 2023, under the supervision of the Monitor, the Remaining Applicants have relied on consultants and legal counsel, as well as the Purchaser's cooperation, to address post-closing matters and progress with an orderly wind-down. The Flowr Group's consultants include Darren Karasiuk, the former CEO of Flowr, and Mike Willetts, former Interim CFO of Flowr.[7]

17. Flowr, a holding company, was a public entity listed on the TSX Venture Exchange under the ticker symbol "FLWR". On February 16, 2023, on account of the Company having no

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[4] Seventh Report, at para 7.
[5] Seventh Report, at para 8.
[6] Seventh Report, at para 9.
[7] Seventh Report, at para 24.

operating business and having sold substantially all of its assets, as well as the resignation of its management and board of directors, the Monitor requested that the common shares of the Company be delisted from the TSX Venture Exchange.[8]

18. On July 21, 2023, the Court granted an Order (the "**Distribution Order**"), which, among other things:

(a) ordered that the Avant Shares be distributed to the holders of certain convertible debentures in Flowr (the "**Debenture Holders**") based upon their registered debenture holdings on a *pro rata* basis up to the amount of their indebtedness (the "**Share Distribution**"); and

(b) ordered that a cash distribution be made to the Debenture Holders based upon their registered debenture holdings on a *pro rata* basis up to the amount of the indebtedness; and;

(c) extended the Stay Period to January 31, 2024.[9]

B. Activities During the Last Stay Period

19. The Monitor worked with Computershare Trust Company of Canada ("**ComputerShare**") to plan the Share Distribution process. As part of this process, the Monitor:

(a) verified the debenture holding information and the Debenture Holders' contact information provided by ComputerShare;

[8] Seventh Report, at para 20.
[9] Seventh Report, at para 10.

(b) calculated the *pro rata* distribution of the Avant Shares (the "**Distribution Calculation**") and reviewed this information with the ComputerShare; and

(c) arranged to provide the documents required by ComputerShare.[10]

20. On or around October 9, 2023, following the Monitor's instruction, ComputerShare completed the distribution of the Avant Shares to the Debenture Holders in accordance with the Distribution Calculation.[11]

21. The Remaining Applicants have had multiple discussions with the Canada Revenue Agency ("**CRA**") and have addressed all audit requests.[12]

22. The Remaining Applicants have maintained compliance with tax reporting requirements. Based on their tax filings, the Remaining Applicants have no outstanding tax obligations for the post-filing period. In addition, Flowr is currently in an HST refund position for the post-filing period.[13]

23. The Remaining Applicants, with the assistance of the Monitor, have continued to work with the Purchaser regarding certain remaining matters related to the Transaction. The Monitor currently holds approximately $737,000 (the "**Escrow Funds**") under an escrow agreement dated January 31, 2023 (the "**Escrow Agreement**"), between EY, as escrow

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[10] Seventh Report, at para 26.
[11] Seventh Report, at para 27.
[12] Seventh Report, at para 29.
[13] Seventh Report, at para 30.

agent, and the Purchaser. Until recently, the release of the Escrow Funds was pending the Purchaser resolving a certain tax matter related to the Transaction.[14]

24. On or around January 23, 2024, the Purchaser's advisor advised the Monitor that the Purchaser intends to terminate the Escrow Agreement without resolving the tax matter.[15]

25. The remaining post-Closing matters of the Flowr Group include the following, with the assistance of the Monitor:

(a) completing HST returns with their external tax accountant for the period ending December 31, 2023, and corporate tax returns for the 2023 fiscal year;[16]

(b) initiating steps to address the release of the Escrow Funds in accordance with the Escrow Agreement;[17] and

(c) calculating the amount owing to the Purchaser and distributing such funds to the Purchaser; and

(d) pursuant to the Distribution Order, the Monitor making a single cash distribution of available funds to the Debenture Holders following the resolution of the remaining post-Closing matters, subject to a reserve established to cover any priority changes under the Initial Order.[18]

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[14] Seventh Report, at para 33.
[15] Seventh Report, at para 33.
[16] Seventh Report, at paras 30, 31.
[17] Seventh Report, at para 33.
[18] Seventh Report, at para 34.

PART III - ISSUES AND THE LAW

26. The issues to be determined on this Motion are whether:

(a) The reports and conduct of the Monitor, and the fees of the Monitor and its legal counsel should be approved;

(b) The CCAA proceedings should be terminated;

(c) The Charges should be terminated;

(d) The Monitor should be discharged and released; and

(e) The stay of proceedings should be extended.

PART IV - LAW AND ARGUMENT

A. The Monitor's Reports, Conduct and Fees Should be Approved

27. As part of the CCAA Termination Order, the Remaining Applicants are seeking the approval of the Monitor's activities as detailed in the Fourth Report and the Seventh Report filed in these CCAA Proceedings.

28. The Remaining Applicants further seek approval of (a) the fees and disbursements of the Monitor and counsel to the Monitor that have been incurred; and (b) the fees and disbursements of the Monitor and counsel to the Monitor that will be incurred in performance of the duties of the Monitor up to the conclusion of these CCAA Proceedings.

29. This Court has previously approved the Monitor's other reports in these CCAA Proceedings, and the conduct and activities therein.

30. In *Target Canada Co. (Re)*, the Court wrote that a request to approve a monitor's report "is not unusual" and that "there are good policy and practical reasons for the court to approve of Monitor's activities and providing a level of protection for Monitors during the CCAA process."[19]

31. In this case, the Monitor's activities and conduct as described in its reports should be approved. The Monitor carried out its activities in a manner consistent with the provisions of the CCAA and in compliance with the Initial Order and all other Orders of the Court issued in the CCAA proceedings.

32. Pursuant to paragraph 29 of the Amended and Restated Initial Order, the Monitor and its counsel are to be paid their reasonable fees and disbursements at their standard rates and charges as part of the costs of the CCAA Proceedings. Pursuant to paragraph 30 of the Amended and Restated Initial Order, the Monitor and its counsel shall pass their accounts from time to time.[20]

33. In approving the fees and disbursements of the Monitor and its counsel, the Court must consider whether those fees were "fair and reasonable in all of the circumstances. The concerns are ensuring that the Monitor is fairly compensated while safeguarding the efficiency and integrity of the CCAA process."[21]

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[19] *Target Canada Co. (Re)*, 2015 ONSC 7574 at paras 2 and 22.

[20] Amended and Restated Initial Order, at paras 29 and 30.

[21] *Nortel Networks Corp. et al. (Re)*, 2017 ONSC 673 at para 13 (citing *Winalta Inc. (Re)*, 2011 ABQB 399 at para. 30).

34. As the Court of Appeal has stated: "The focus of the fair and reasonable assessment should be on what was accomplished, and not on how much time it took".[22] The Court of Appeal has also provided guidance as to how to evaluate the quantum of requested fees, including assessing various factors including but not limited to (i) the time spent, (ii) the Monitor's knowledge, experience and skill, (iii) the responsibilities assumed; (iv) the results achieved, and (v) the cost of comparable services when performed in a prudent and economical manner.[23]

35. The Monitor facilitated and implemented a successful SISP in accordance with the SISP Order. The Monitor also facilitated the Closing in accordance with the Approval and Vesting Order. The Monitor has spent significant time with the Remaining Applicants in facilitating the remaining post-Closing activities and wind down of these CCAA Proceedings.[24]

36. The fees and disbursements of the Monitor and its counsel set out in the Fee Affidavits, including the Fee Estimates are fair, reasonable and commensurate with the size and complexity of the CCAA proceedings.[25]

37. The Monitor's and its counsel's professional rates are comparable to the rates charged by other professional firms in the Toronto market for the provision of similar services regarding commercial restructuring matters.[26]

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[22] *Bank of Nova Scotia v. Diemer*, 2014 ONCA 851, at para 45.

[23] *Confectionately Yours Inc.*, 2002 CanLII 4505, at paras 42 – 54.

[24] Seventh Report, at paras 23 – 35.

[25] Seventh Report, at para 49.

[26] Seventh Report, at Appendix C (Affidavit of Allen Yao, at para 6) and Appendix D (Affidavit of Rebecca Kennedy, at para 7).

38. In light of the foregoing, the Remaining Applicants are of the view that the fees and disbursements of the Monitor and its counsel should be approved.

B. The CCAA should be Terminated at the CCAA Termination Time

39. The Remaining Applicants submit that this Court should grant the proposed CCAA Termination Order, which provides for the termination of the CCAA Proceedings and discharge of the Monitor upon the service of the Termination Certificate.

40. This Court has the jurisdiction to terminate the CCAA Proceedings pursuant its broad jurisdiction under section 11 of the CCAA, which provides:

> 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.

41. The Supreme Court of Canada has held that the best outcome [of CCAA proceedings] "is achieved when the stay of proceedings provides the debtor with some breathing space during which solvency is restored and the CCAA process terminates without reorganization being needed."[27]

42. The Remaining Applicants are seeking to terminate the CCAA proceedings once the remaining activities of the Monitor are complete. The Remaining Applicants no longer have business operations and the Monitor will carry out the remaining post-Closing activities with the assistance of certain consultants and counsel.

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[27] *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, at para 14.

43. Following completion of the remaining administrative activities, which include, completing tax returns for HST and collecting receipts, and distributing funds to the Debenture Holders and the Purchaser, these CCAA Proceedings will be complete.[28] The Remaining Applicants are seeking to terminate these CCAA Proceedings effective at the CCAA Termination Time, as they will no longer require the benefit of the stay of proceedings and creditor protection.[29] The CCAA Termination Time will be effected by the Monitor filing a Termination Certificate.

44. This Court has previously granted similar orders when there are no material steps left in the CCAA proceedings, and allowed for termination of a CCAA proceeding upon the filing of the Termination Certificate at a future date.[30]

45. The CCAA Proceedings have served their purpose with the Monitor facilitating a successful SISP, facilitating the Closing of the Transaction, and other wind-down activities post-Closing.

46. The Monitor supports the termination of these CCAA Proceedings on the terms set forth in the CCAA Termination Order.[31]

C. The Charges in the Initial Order Should be Terminated

47. The proposed CCAA Termination Order provides for the discharge of the court-ordered Charges, effective as of the service of the Termination Certificate on the Service List. The

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[28] Seventh Report, at paras 31, 34, 35.

[29] Seventh Report, at para 43.

[30] *Re Peraso Technologies Inc.* (28 October 2020), Toronto CV-20-00642010-00CL (Ont. Sup. Ct. [Comm. List] Order (Termination of CCAA Proceedings)); *Re Chalice Brands Ltd.* (28 September 2023), Toronto CV-23-00699872-00CL (Ont. Sup. Ct. [Comm. List] CCAA Termination Order).

[31] Seventh Report, at para 50.

Charges comprise of the Administration Charge, the DIP Lender's Charge, and the Director's Charge.

48. All amounts owing, which are secured by the Administration Charge will be paid prior to the CCAA Termination Time as the Monitor will identify and address all priority payables being paid prior to the single cash distribution.[32] In addition, the amounts owing under the DIP Term Sheet and secured by the DIP Lender's Charge have been satisfied.[33]

49. Accordingly, the CCAA Charges should be terminated as at the CCAA Termination Time.

D. The Monitor Should be Discharged and Released at the CCAA Termination Time

50. The Remaining Applicants seek to discharge EY from its role as Monitor upon the serving of the Termination Certificate on the Service List. The Remaining Applicants also seek a release in favour of the Monitor and its counsel.

51. The Court's jurisdiction for making such an order is grounded in section 11 of the CCAA, and is common as part of termination orders similar to the proposed Termination Order herein.[34]

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[32] Seventh Report, at para 31.

[33] Seventh Report, at para 7.

[34] s. 11, CCAA. *Re Peraso Technologies Inc.* (28 October 2020), Toronto CV-20-00642010-00CL (Ont. Sup. Ct. [Comm. List] Order (Termination of CCAA Proceedings)).

52. It is now commonplace for third-party releases, in favor of parties to a restructuring, which includes their professional advisors as well as their directors, officers and others, to be approved outside of a plan in the context of a transaction.[35]

53. The Court must ask: (a) whether the parties to be released were necessary to the 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.[36] It is not necessary for each of these factors to apply in order for the proposed release to be granted.[37]

54. The Monitor and its counsel have made material contributions to this restructuring and have been essential to the restructuring.[38] As stated by the Honourable Justice Koehnen in *Green Relief*, a CCAA proceeding "quite obviously cannot proceed without a Monitor, Monitor's counsel or company counsel."[39]

55. Looking forward, the Monitor and its counsel will continue to facilitate post-Closing matters and the wind down of these CCAA Proceedings.

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[35] *Blackrock Metals Inc.*, 2022 QCCS 2828, at para 128 [*Blackrock*] (citing *Re Green Relief Inc.*, 2020 ONSC 6837, at paras 23-25 [*Green Relief*]); *Re 8640025 Canada Inc.*, 2021 BCSC 1826, at para 43. *Lydian International Limited (Re)*, 2020 ONSC 4006 at para 54 [*Lydian*].

[36] *Blackrock*, 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*, at para 27.

[37] *Green Relief*, at para 28.

[38] Seventh Report, at paras, 26 – 35; *Green Relief*, at paras 54, 60.

[39] *Green Relief*, at para 50.

E. The Stay Should be Extended

56. The Remaining Applicants seek an extension of the Stay Period to the CCAA Termination Time.

57. A court may grant an extension of the stay of proceedings where the court is satisfied that: (a) circumstances exist that make the order appropriate; and (b) the debtor has acted, and is continuing to act, in good faith and with due diligence.[40]

58. Here, the extension of the Stay Period is reasonable and appropriate in the circumstances as it allows the Remaining Applicants to address the following remaining post-Closing matters, including to:

(a) finalize all remaining tax matters of the Remaining Applicants;

(b) complete the escrow fund matter and other outstanding matters related to the Transaction, and to determine the amounts payable to the Purchaser; and

(c) distribute the remaining funds to the Debenture Holders.[41]

59. The Remaining Applicants have sufficient liquidity to fund the wind-down activities through the proposed extension of the Stay Period to the CCAA Termination Time.[42]

60. The Remaining Applicants have acted and continue to act in good faith and with due diligence in these CCAA proceedings.[43]

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[40] s 11.02(2)-(3), CCAA.
[41] Seventh Report, at para 41.
[42] Seventh Report, at para 39.
[43] Seventh Report, at para 41.

61. The Monitor is supportive of the extension of the Stay Period to the termination of these CCAA Proceedings.[44]

PART V - ORDER REQUESTED

62. For the reasons set out herein, the Remaining Applicants request that this Court grant the proposed CCAA Termination Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 29th day of January, 2024.

Kyla Mahar Gina Rhodes

MILLER THOMSON LLP
Lawyer for the Applicants

[44] Seventh Report, at para 44.

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60
2. *Re Chalice Brands Ltd.* (28 September 2023), Toronto CV-23-00699872-00CL (Ont. Sup. Ct. [Comm. List] CCAA Termination Order)
3. *Re Peraso Technologies Inc.* (28 October 2020), Toronto CV-20-00642010-00CL (Ont. Sup. Ct. [Comm. List] Order (Termination of CCAA Proceedings)).
4. *Blackrock Metals Inc.*, 2022 QCCS 2828
5. *Re Green Relief Inc.*, 2020 ONSC 6837
6. *Lydian International Limited (Re)*, 2020 ONSC 4006
7. *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587
8. *Nortel Networks Corp. et al. (Re)*, 2017 ONSC 673
9. *Confectionately Yours Inc., Re* 2002 CanLII 45059
10. *Bank of Nova Scotia v. Diemer*, 2014 ONCA 851
11. *Target Canada Co., Re*, 2015 ONSC 2066

SCHEDULE "B"
RELEVANT STATUTES

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

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, etc. — other than initial application

11.02 (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.

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Proceedings commenced at Toronto

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(Motion Returnable January 30, 2024)

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