Court File No. CV-14-10609-00CL

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 AND ARRANGEMENT INVOLVING METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS VII CORP. IN ITS CAPACITY AS ISSUER TRUSTEE OF THE DEVONSHIRE TRUST

Applicant

FACTUM OF THE APPLICANT
(Initial Application returnable July 8, 2014)

Dated: July 4, 2014

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TO: THE SERVICE LIST

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PART I - OVERVIEW[1]

1. This application is by Metcalfe & Mansfield Alternative Investments VII Corp., in its capacity as issuer trustee (the "**Applicant**") of the Devonshire Trust (the "**Conduit**" and together with the Applicant, the "**CCAA Parties**") for relief in the form of an initial order ("**Initial CCAA Order**") under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C.36, as amended (the "**CCAA**").

2. The Conduit is a trust (also known as a "conduit") that issued ABCP until August 2007, when the Canadian market in ABCP froze placing the Canadian financial market at risk.

3. The ABCP market was subsequently restructured - first under the terms of the Montreal Accord (signed on August 16, 2007) and then through proceedings under the CCAA

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[1] Capitalized terms used herein but not otherwise defined have the meanings ascribed to them in the Affidavit of Mathieu Lafleur-Ayotte, sworn June 27, 2014 in support of the Initial CCAA Order (the "**Lafleur-Ayotte Affidavit**").

filed on March 17, 2008. The ABCP CCAA Proceedings involved 20 "conduits" representing approximately $32 billion of issued notes.[2]

4. The ABCP CCAA Proceedings did not encompass the Conduit as Barclays and the Conduit's investors decided to consider separate restructuring alternatives for that ABCP issuer commencing in December, 2007. The Conduit then became involved in protracted litigation with Barclays commencing on January 13, 2009. The Settlement Agreement has been entered into in order to resolve all issues in the Litigation and allow a substantial distribution to the Noteholders. The vehicle to achieve the settlement of the Litigation and distribution is the proposed Plan.[3]

5. The proposed Plan is beneficial to all stakeholders as it:

(a) allows for the resolution of the acrimonious and expensive Litigation;

(b) unlocks value to the Noteholders without awaiting the outcome of the possible continued Litigation, which could take years;

(c) provides certainty to the Noteholders with respect to proceeds available to them;

(d) creates a mechanism to pay the Conduit's liabilities, in particular certain taxes, and distribute proceeds to Noteholders; and

(e) provides finality to all stakeholders.[4]

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2 Lafleur-Ayotte Affidavit, para 3, Application Record, Tab 2.

3 Lafleur-Ayotte Affidavit, para 4, Application Record, Tab 2.

4 Lafleur-Ayotte Affidavit, para 5, Application Record, Tab 2.

PART II - THE FACTS

6. The facts with respect to this Application are more fully set out in the Affidavit of Mathieu Lafleur-Ayotte, sworn June 27, 2014 in support of this CCAA filing (the "**Lafleur-Ayotte Affidavit**").

A. THE CONDUIT

7. The Conduit was established by the Settlement Deed wherein MMCC was the settlor and the Applicant was designated as issuer trustee of the Conduit.[5]

8. The Applicant is a corporation incorporated pursuant to the *Canada Business Corporations Act* ("**CBCA**") having its registered office at 141 Adelaide St. West, Toronto (ON) M5H 3L5. The Applicant is the legal owner of the assets held in the Conduit and is the debtor with respect to the Notes issued in respect of the Conduit. The amount of debt under the Notes for which the Applicant is liable exceeds $5,000,000.[6]

9. The Applicant is insolvent in the absence of the payments from Barclays to be received under the terms of the Settlement Agreement and the Plan. The face amount of outstanding Notes is approximately $679,000,000. This amount, plus certain interest, is presently due and owing. The liquid assets of the Conduit without the benefit of the Settlement Agreement and the Plan total approximately $153,000,000. Accordingly, without the benefit of proceeds to be paid pursuant to the Settlement Agreement and the Plan, the Conduit does not have the ability to pay its liabilities.[7]

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5 Lafleur-Ayotte Affidavit, para 17, Application Record, Tab 2.

6 Lafleur-Ayotte Affidavit, para 51, Application Record, Tab 2.

7 Lafleur-Ayotte Affidavit, para 52, Application Record, Tab 2.

B. FURTHER BACKGROUND FACTS

10. The facts relating to the ABCP market in Canada, the Barclays – Devonshire ABCP – CDS Transaction, the turmoil in the ABCP market and the ABCP CCAA Proceedings, the Conduit and the Notes, the Litigation, the Settlement Agreement, and a summary of the Plan, including the potential benefits, are set out in the Lafleur-Ayotte Affidavit.

C. THE NEED FOR CCAA RELIEF

11. The transactions contemplated by the Settlement Agreement need to be effected by way of the Plan in order to:

(a) allow for the termination of the Litigation;

(b) allow for the payment of the Settlement Amount;

(c) comply with the requirements of the Settlement Agreement thereby unlocking approximately $745,000,000 for the benefit of Noteholders;

(d) bind all Noteholders to the modifications to the interest provisions of the Notes set out in the Plan;

(e) bind all Noteholders to the acceptance of the amounts to be distributed under the Plan in full and final satisfaction of their claims under their respective Notes;

(f) create, in the Plan, a distribution process that creates certain reserves to allow for the payment of certain liabilities of the Conduit, in particular potential Tax liabilities;

(g) extinguish Barclays' Other Claims; and

(h) provide, through the release provisions, the finality required by all parties in order to allow the distribution of the assets of the Conduit and the winding up of the Conduit.[8]

PART III - ISSUES

12. The issue to be determined on this Application is whether the Court should grant the relief being sought by the Applicant. The relief sought in this Application includes, *inter alia*:

(a) a declaration that the Applicant is a party to which the CCAA applies;

(b) a stay of proceedings in favour of the Applicant and its directors and officers;

(c) a stay of proceedings in favour of non-debtors that were integrally involved with certain aspects of the Conduit's business or whose support is essential to the Plan;

(d) the appointment of Deloitte to act as the Monitor in the CCAA Proceedings;

(e) the approval of the Administration Charge;

(f) the approval of the D&O Charge;

(g) the classification of creditors in a single voting class, being all Noteholders;

(h) the approval of the claims and meeting procedure; and

(i) if the Plan is approved by the requisite majority of Noteholders, the approval of the releases contemplated by the Plan.

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[8] Lafleur-Ayotte Affidavit, para 50, Application Record, Tab 2.

13. The Applicant submits that this Application should be granted on the following basis:

(a) this Application complies with all requirements of the CCAA;

(b) the relief sought is consistent with the purpose of the CCAA; and

(c) the relief sought is available under the CCAA.

PART IV - THE LAW

D. THIS APPLICATION COMPLIES WITH ALL REQUIREMENTS OF THE CCAA

D.1. This Application Concerns a Debtor Company with Debts over $5 Million

14. Section 3(1) of the CCAA states that the statute applies in respect of a "debtor company" if the total claims against the "debtor company" are more than $5,000,000.

(a) The Applicant is a "Company"

15. Section 2(1) of the CCAA sets out the definition of "company" as follows:

> *"2(1) **"company"** means any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province, any incorporated company having assets or doing business in Canada, wherever incorporated, and any income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the Bank Act, railway or telegraph companies, insurance companies and companies to which the Trust and Loan Companies Act applies;"*

Section 2(1), *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C.36, as amended; Factum of the Applicant, Schedule B

16. The Applicant is incorporated under the CBCA and does not fall within the excluded categories of "company" listed in the above definition. The Applicant is a "company" within the meaning of the CCAA definition.

(b) The Applicant is a "Debtor Company"

17. Section 2(1) of the CCAA defines a "debtor company" as follows:

> *"2(1) **"debtor company"** means any company that*
>
> *(a) is bankrupt or insolvent,*
>
> *(b) has committed an act of bankruptcy within the meaning of the Bankruptcy and Insolvency Act or is deemed insolvent within the meaning of the Winding-up and Restructuring Act, whether or not proceedings in respect of the company have been taken under either of those Acts,*
>
> *(c) has made an authorized assignment or against which a bankruptcy order has been made under the Bankruptcy and Insolvency Act, or*
>
> *(d) is in the course of being wound up under the Winding-up and Restructuring Act because the company is insolvent."*

***Companies' Creditors Arrangement Act, supra* at section 2(1); Factum of the Applicant, Schedule B**

18. There is no definition of "insolvent" in the CCAA. There is a definition of "insolvent person" under the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 (the "**BIA**") and it has become common practice to refer to this BIA definition when reference is made to insolvency in the context of the CCAA.

***Re Stelco Inc.*, (2004) 48 C.B.R. (4th) 299 (Ont. S.C.J.) at paras 21-22; leave to appeal to C.A. ref'd, [2004] O.J. No. 1903; leave to appeal to S.C.C. ref'd [2004] S.C.C.A. No. 336; Book of Authorities of the Applicant, Tab 1**

19. The definition of "insolvent person" under the BIA is as follows:

> *"2(1) **"insolvent person"** means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and*
>
> *(a) who is for any reason unable to meet his obligations as they generally become due,*
>
> *(b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or*
>
> *(c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal*

process, would not be sufficient to enable payment of all his obligations, due and accruing due."

Section 2(1), *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3, as amended; Factum of the Applicant, Schedule B

20. A debtor need only meet one of the three prongs of the above referenced test to be determined to be "insolvent" for the purposes of the CCAA.

***Re Stelco Inc., supra* at para 28; Book of Authorities of the Applicant, Tab 1**

21. In the present case, the face amount of outstanding Notes is approximately $679,000,000. This amount, plus interest, is presently due and owing. The liquid assets of the Conduit without the benefit of the Settlement Agreement and the Plan total approximately $153,000,000. Accordingly, without the benefit of proceeds to be paid pursuant to the Settlement Agreement and the Plan, the Conduit does not have the ability to pay its liabilities.[9]

22. The Applicant is therefore insolvent. As a matter of law, a trust is a relationship and not a legal person. The trustee is the obligor under the trust's covenant to pay, and where trust assets are insufficient to meet payment obligations, a trustee who otherwise satisfies the requirements of the CCAA may have recourse to that statute to compromise the obligations owed in respect of a trust.

***ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, (2008) 42 C.B.R. (5th) 90 at para 29, aff'd on other grounds 2008 ONCA 587; Book of Authorities of the Applicant, Tab 2**

23. The insolvency of the Applicant is not affected or negated by contractual provisions in the Notes and Trust Indenture that limit Noteholders' recourse to the trust assets held in the Conduit. It is the existence of a debt, and not the rights and remedies of a creditor with respect to such debt, that renders a debtor insolvent.

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[9] Lafleur-Ayotte Affidavit, para 52, Application Record, Tab 2.

***ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp., supra* at para 33; Book of Authorities of the Applicant, Tab 2**

(c) The Claims Against the Applicant Exceed $5 Million

24. The amount of debt for which the Applicant is liable is approximately $679,000,000, significantly in excess of the $5 million threshold as provided for in the CCAA.

E. THE RELIEF SOUGHT IS CONSISTENT WITH THE PURPOSE OF THE CCAA

25. In addition to complying with the technical requirements of the CCAA, this application is consistent with the purpose underlying the Act.

26. The CCAA does not have an express purpose clause, although the editors of *The 2012 Annotated Bankruptcy and Insolvency Act* suggest that its long title, *An Act to facilitate compromises and arrangements between companies and their creditors* indicates that its objective is to assist insolvent companies in developing and seeking approval of compromises and arrangements with their creditors.

Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, *The 2012-2013 Annotated Bankruptcy and Insolvency Act*, (Toronto: Carswell, 2012) at N§2, p.1174; Book of Authorities of the Applicant, Tab 3

27. In *Century Services Inc. v. Canada (Attorney General),* the Supreme Court of Canada recently canvassed the purpose and policy behind the CCAA. While in most circumstances resort is made to the CCAA to "permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets" and to create "conditions for preserving the *status quo* while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all", the reality is that "reorganizations of differing complexity require different legal mechanisms."

***Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 at paras 15, 77 and 78; Book of Authorities of the Applicant, Tab 4**

***Re First Leaside Wealth Management Inc.*, 2012 ONSC 1299 at para 32; Book of Authorities of the Applicant, Tab 5**

28. This reality has led courts to recognize that, in appropriate circumstances, the purpose of the CCAA can be utilized to effect a winding-up or liquidation of a debtor company and its assets.

***Re Anvil Range Mining Corp.*, (2002) 34 C.B.R. (4th) 157 at para 32, Book of Authorities of the Applicant, Tab 6**

***Re First Leaside Wealth Management Inc.*, *supra* at paras 32-37. Book of Authorities of the Applicant, Tab 5**

Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, *The 2012-2013 Annotated Bankruptcy and Insolvency Act*, *supra* at N§2, p.1175; Book of Authorities of the Applicant, Tab 3

29. CCAA courts have been called upon to innovate in exercising their jurisdiction beyond merely staying proceedings against the debtor to allow breathing room for reorganization. They have been asked to sanction measures for which there is no explicit authority in the CCAA.

***Century Services Inc. v. Canada (Attorney General)*, *supra* at para 61; Book of Authorities of the Applicant, Tab 4**

30. In the present case, the Applicant is seeking to implement the Settlement Agreement by way of the Plan. The Settlement Agreement provides for, *inter alia*, the distribution of the assets of the Conduit to Noteholders.

31. It is a condition of the Settlement Agreement that the distribution be effected by way of the Plan, thereby unlocking approximately $745,000,000 for the benefit of Noteholders and putting an end to protracted litigation between the various stakeholders.

32. There is no viable option to continue the Conduit as a going concern. The most appropriate course of action is to seek the approval of the Noteholders to effect an orderly liquidation of its assets by way of the Plan in order to:

(a) allow for the termination of the Litigation;

(b) allow for the payment of the Settlement Amount;

(c) comply with the requirements of the Settlement Agreement thereby unlocking approximately $745,000,000 for the benefit of Noteholders;

(d) bind all Noteholders to the modifications to the interest provisions of the Notes set out in the Plan;

(e) bind all Noteholders to the acceptance of the amounts to be distributed under the Plan in full and final satisfaction of their claims under their respective Notes;

(f) create, in the Plan, a distribution process that creates certain reserves to allow for the payment of certain liabilities of the Conduit, in particular potential Tax liabilities;

(g) extinguish Barclays' Other Claims; and

(h) provide, through the release provisions, the finality required by all parties in order to allow the distribution of the assets of the Conduit and the winding up of the Conduit.[10]

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[10] Lafleur-Ayotte Affidavit, para 50, Application Record, Tab 2.

33. In the circumstances, the Applicant submits that the relief requested herein is consistent with the purpose of the CCAA and is critical for a successful implementation of the Settlement Agreement to maximize value for the stakeholders.

F. THIS RELIEF SOUGHT IS AVAILABLE UNDER THE CCAA

F.1. The Court Should Grant a Stay of Proceedings in Favour of the CCAA Parties and its Directors and Officers

34. The Applicant is seeking a court ordered stay of proceedings in favour of the CCAA Parties. Section 11.02(1) of the CCAA provides statutory jurisdiction for the court to grant a stay of proceedings in an Initial Order:

> *"**11.02(1) Stay etc. - initial application** - 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 30 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."*

***Companies' Creditors Arrangement Act, supra* at section 11.02(1); Factum of the Applicant, Schedule B**

35. The Applicant is also seeking an order staying all proceedings against any of the former, current or future directors or officers of the Applicant with respect to any claim against the directors or officers that relates to any obligations of the CCAA Parties whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations.

36. Section 11.03(1) provides express statutory jurisdiction to extend the stay of proceedings in favour of directors:

> *"**11.03(1) Stays - directors** - An order made under section 11.02 may provide that no person may commence or continue any action against a director of the company on any claim against directors that arose before the commencement of proceedings under this Act and that relates to obligations of the company if directors are under law liable in their capacity as directors for the payment of those obligations, until a compromise or an arrangement in respect of the company, if one is filed, is sanctioned by the court or is refused by the creditors or the court."*

***Companies' Creditors Arrangement Act, supra* at section 11.03(1); Factum of the Applicant, Schedule B**

37. The stay of proceedings restrains judicial or extra-judicial conduct that could impair the ability of the debtor to operate its business or to focus its efforts on restructuring its affairs. The purpose of the stay of proceedings is to maintain the *status quo* so that steps can be taken under the CCAA for the benefit of all creditors.

***Toronto Stock Exchange Inc. v. United Keno Hill Mines Ltd.*, (2000) 19 C.B.R. (4th) 299 at para 11; Book of Authorities of the Applicant, Tab 7**

***Re Northland Properties Ltd.*, (1988) 73 C.B.R. (N.S.) 141 at paras 18-19; Book of Authorities of the Applicant, Tab 8**

38. In *Re Lehnddorff General Partner Ltd.*, Justice Farley recognized that:

> *"the intention of the CCAA is to prevent any manoeuvres for positioning among the creditors during the period required to develop a plan and obtain approval of creditors. Such manoeuvres could give an aggressive creditor an advantage to the prejudice of others who are less aggressive and would undermine the company's financial position making it even less likely that the plan will succeed."*

***Re Lehndorff General Partner Ltd.*, (1993) 17 C.B.R. (3d) 24 at para 6; Book of Authorities of the Applicant, Tab 9**

39. The stay provisions of the CCAA are discretionary and extraordinarily broad. The power to grant the stay is to be interpreted broadly in order to permit the CCAA to accomplish its legislative purpose.

Re Canwest Global Communications Corp., (2009) 61 C.B.R. (5th) 200 at paras 27-28; **Book of Authorities of the Applicant, Tab 10**

40. The courts have previously granted a stay of proceedings in the context of a winding-up or liquidation CCAA.

Re First Leaside Wealth Management Inc., *supra*; **Book of Authorities of the Applicant, Tab 5**

41. The Applicant requires the protection of a stay of proceedings to allow a meeting of creditors to be convened to vote upon the Plan. The stay is required to maintain an even playing filed pending the conduct of the meeting and the sanction hearing. In these circumstances, the Applicant respectfully submits that an Order granting a stay of proceedings is appropriate.

F.2. The Court Should Grant a Stay of Proceedings in Favour of Non-Debtors

42. Section 11.02 of the CCAA provides for a stay of proceedings against debtor companies. This provision is silent as to the availability of a stay of proceedings in favour of non-parties. Nevertheless, the granting of stays in favour of non-parties has been held to be an appropriate exercise of the Court's inherent jurisdiction under the CCAA.

Re Lehndorff General Partner Ltd., *supra* **at paras 14-16; Book of Authorities of the Applicant, Tab 9**

43. A number of authorities have supported the concept of a stay in favour of non-parties to enable a global resolution of interwoven claims against debtor and non-debtor parties alike.

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp., supra **at para 48; Book of Authorities of the Applicant, Tab 2**

Campeau v. Olympia & York Developments Ltd.., **(1992) 14 C.B.R. (3d) 303 at paras 23-25; Book of Authorities of the Applicant, Tab 11**

Re Muscletech Research & Development Inc., **(2006) 19 C.B.R. (5th) 54 at para 3; Book of Authorities of the Applicant, Tab 12**

44. The Applicant submits that the stay of proceedings should be extended in favour of the Indenture Trustee, the Issuing and Paying Agent, the Custodian and the Consultant relating in any way to their acting as such. These parties are or were all direct stakeholders in the Conduit or service providers to the Conduit and their participation is vital to the CCAA Proceedings. The requested stay is appropriate and necessary to allow the Noteholders to vote on the Plan without steps being taken that could undermine the proposed compromises that form the basis of the Settlement Agreement and the Plan.

F.3. The Court Should Approve the Appointment of the Monitor

45. The Applicant is seeking to appoint Deloitte as Monitor in these CCAA Proceedings.

46. Section 11.7(1) of the CCAA mandates the appointment of a person to monitor the business and financial affairs of the company. The person so appointed must be a trustee, within the meaning of subsection 2(1) of the BIA.

> ***Companies' Creditors Arrangement Act, supra*** **at section 11.7(1); Factum of the Applicant, Schedule B**

47. The Monitor has confirmed to the Applicant that it is qualified and willing to act as Monitor in these proceedings.[11]

F.4. The Court Should Approve the Administration Charge

48. The Applicant is seeking the Administration Charge to secure the reasonable fees and disbursements of the Monitor, counsel to the Monitor and counsel to the CCAA Parties, incurred in connection with services rendered to the CCAA Parties both before and after the commencement the CCAA proceedings.

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[11] First Report of the Proposed Monitor dated July 3, 2014 at paras 7-8.

49. The CCAA provides the court with express statutory jurisdiction to grant a priority charge in respect of certain fees and expenses:

> *"**11.52(1) Court may order security or charge to cover certain costs** - 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.*
>
> ***11.52(2) Priority** - The court may order that the security or charge rank in priority over the claim of any secured creditor of the company."*

***Companies' Creditors Arrangement Act, supra* at section 11.52; Factum of the Applicant, Schedule B**

50. The Initial Order provides that the Administration Charge shall rank in priority to the existing security interests of Barclays and the Indenture Trustee acting for the benefit of Noteholders. Both have been served with notice of these CCAA Proceedings.[12]

51. In addition to the considerations specifically set out above in section 11.52(1) of the CCAA, courts have looked to the following criteria when deciding whether to approve an administration charge:

(a) the size and complexity of the businesses being restructured;

(b) the proposed role of the beneficiaries of the charge;

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[12] Lafleur-Ayotte Affidavit, para 57, Application Record, Tab 2.

(c) whether there is an unwarranted duplication of roles;

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

(e) the position of the secured creditors likely to be affected by the charge; and

(f) the position of the Monitor.

***Re Canwest Publishing Inc.*, 2010 ONSC 222 at para 54; Book of Authorities of the Applicant, Tab 13**

52. In the present matter, the Applicant respectfully submits that the proposed Administration Charge in favour of the proposed beneficiaries is supported by the following factors:

(a) the Applicant does not maintain any ongoing operations or business. However, the Settlement Agreement which is to be implemented by way of the Plan is the result of lengthy negotiations between parties involved in complex litigation dealing with complicated financial products. An understanding of the complexity of the ABCP market and the history of the Litigation is essential to the implementation of the Plan;

(b) the proposed beneficiaries will provide essential financial and legal services throughout the CCAA Proceedings and the continued participation of each of the insolvency professionals is critical to the success of the implementation of the Plan;

(c) there is no anticipated unwarranted duplication of roles;

(d) the Applicant has worked with the proposed Monitor to estimate the proposed quantum of the Administration Charge and believes it to be reasonable and appropriate in view the services to be provided by the beneficiaries of the Administration Charge;[13]

(e) the Administration Charge is necessary to ensure that the proposed beneficiaries' fees and disbursements are protected. The beneficiaries' of the charge are unlikely to assist in the CCAA Proceedings without enjoying the benefit of the Administration Charge;

(f) the Applicant has provided notice of the return date of this Application to all of the its known secured creditors and has provided each with a copy of its Application Record; and

(g) the Monitor has advised that it is supportive of the proposed Administration Charge.[14]

53. In view of the foregoing, the Applicant submits that it is both appropriate and necessary for the court to approve the Administration Charge.

F.5. The Court Should Approve the D&O Charge

54. The Applicant is seeking an order that the CCAA Parties indemnify the directors and officers of the Applicant against obligations and liabilities that they may incur in their capacity as directors or officers of the Applicant from and after the commencement of the CCAA proceedings, and to create the D&O Charge as security for the potential obligations and

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[13] Lafleur-Ayotte Affidavit, para 56, Application Record, Tab 2.

[14] First Report of the Proposed Monitor dated July 3, 2014 at para 46.

liabilities they may incur after the commencement of these proceedings. The D&O Charge is proposed to rank behind the Administration Charge.

55. Section 11.51 of the CCAA expressly provides for the granting of a directors' and officers' charge on a priority basis:

> *"**11.51(1) Security or charge relating to director's indemnification** - 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.*
>
> ***11.51(2) Priority** - The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.*
>
> ***11.51(3) Restriction - indemnification insurance** - 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.*
>
> ***11.51(4) Negligence, misconduct or fault** - 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."*
>
> ***Companies' Creditors Arrangement Act, supra* at section 11.51; Factum of the Applicant, Schedule B**

56. The directors and officers of the Applicant do not benefit from any directors and officers' indemnification insurance. The directors and officers are unable to procure such insurance for a reasonable cost and without a substantial deductible.[15]

57. In *Re Canwest Global Communications Corp.*, Pepall J. considered the purposes behind section 11.51 of the CCAA and stated:

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[15] Lafleur-Ayotte Affidavit, para 60, Application Record, Tab 2.

> *"The purpose of such a charge is to keep the directors and officers in place during the restructuring by providing them with protection against liabilities they could incur during the restructuring: Re General Publishing Co. [(2003), 39 CBR (4th) 216)]. Retaining the current directors and officers of the applicants would avoid destabilization and would assist in the restructuring. The proposed charge would enable the applicants to keep the experienced board of directors supported by experienced senior management. The proposed Monitor believes that the charge is required and is reasonable in the circumstances and also observes that it will not cover all of the directors' and officers' liabilities in the worst case scenario. In all of the circumstances, I approved the request."*
>
> ***Re Canwest Global Communications Corp.*, (2009), 59 CBR (5th) 72 at para 48; Book of Authorities of the Applicant, Tab 14**

58. In the present matter, the Applicant submits that the D&O Charge should be granted on the following basis:

(a) given the lack of directors and officers indemnification insurance the directors and officers of the Applicant have indicated that they are not prepared to continue their service with the Applicant and take the steps necessary to implement the Plan, if approved by the Noteholders and the CCAA Court, unless the Initial CCAA Order grants the D&O Charge;[16]

(b) to ensure the ongoing stability of the Conduit during the CCAA Proceedings and in order to complete the transactions contemplated in the Plan, the CCAA Parties require the continued participation of the Applicant's directors and officers;[17] and

(c) the Monitor has indicated in the First Report that the D&O Charge is reasonable and that it is supportive of the relief sought by the Applicant.[18]

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16 Lafleur-Ayotte Affidavit, para 61, Application Record, Tab 2.

17 Lafleur-Ayotte Affidavit, para 58, Application Record, Tab 2.

18 First Report of the Proposed Monitor dated July 3, 2014 at para 47.

59. The D&O Charge will allow the Applicant to continue to benefit from the expertise and knowledge of its directors and officers. The quantum of the D&O Charge has been agreed to by Barclays and the CDPQ. In the circumstances, the Applicant submits that the D&O Charge is reasonable.

F.6. The Court Should Classify the Creditors as a Single Class

60. The Applicant is proposing a single class of creditors to vote on the Plan, being all Noteholders.

61. Section 22(1) of the CCAA now codifies the court's authority to approve classes of creditors for the purpose of voting on a CCAA plan and provides as follows:

> *"**22(1) Company may establish classes** - A debtor company may divide its creditors into classes for the purpose of a meeting to be held under section 4 or 5 in respect of a compromise or arrangement relating to the company and, if it does so, it is to apply to the court for approval of the division before the meeting is held."*
>
> ***Companies' Creditors Arrangement Act, supra* at section 22(1); Factum of the Applicant, Schedule B**

62. This provision has not received any substantive judicial consideration since its enactment. Section 22(1) of the CCAA provides that a debtor company must apply to court only when seeking the approval of the *division* of its creditors into classes. A plain reading of this provision suggests that the default position under the CCAA is that all creditors are to be placed into a single class for the purposes of voting on a plan, and that a debtor company must obtain the court's approval only when seeking to deviate from this default position.

63. In the present matter, the Applicant is not seeking to divide its creditors into classes, and it is therefore unclear if it is required to seek this Court's approval of its classification. Nonetheless, the single class of creditors that is being proposed by the Applicant is

consistent with the "commonality of interest" test that has evolved under the CCAA and which is now expressly provided for in section 22(2) of the Act. Section 22(2) of the CCAA sets out certain factors that may be considered in approving a classification for voting purposes:

> *"**22(2) Factors** - "For the purposes of subsection (1), creditors may be included in the same class if their interests or rights are sufficiently similar to give them a commonality of interest, taking into account:*
> *(a) the nature of the debts, liabilities or obligations giving rise to their claims;*
> *(b) the nature and rank of any security in respect of their claims;*
> *(c) the remedies available to the creditors in the absence of the compromise or arrangement being sanctioned, and the extent to which the creditors would recover their claims by exercising those remedies; and;*
> *(d) any further criteria, consistent with those set out in paragraphs (a) to (c), that are prescribed."*

Companies' Creditors Arrangement Act, supra **at section 22(2); Factum of the Applicant, Schedule B**

64. These criteria are simply a codification of the previous jurisprudence and therefore the pre-amendment cases continue to be relevant with respect to the consideration of the proper classification of creditors.

Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, *The 2012-2013 Annotated Bankruptcy and Insolvency Act, supra* at N§149; Book of Authorities of the Applicant, Tab 3

***Re SemCanada Crude Company.*, 2009 ABQB 490 at para 44; Book of Authorities of the Applicant, Tab 15**

65. A single class of creditors is appropriate in this case as each creditor holds Notes issued by the Conduit. Accordingly, each Noteholder will have substantially similar interests with respect to each of the factors set out in section 22(2) of the CCAA.

66. The Plan is, in essence, an offer to all Noteholders that must be accepted or made binding on all Noteholders. In light of this, it is appropriate that the Plan proposes a single voting class, being all Noteholders. This is consistent with the approach taken in the ABCP

CCAA Proceedings, where the Court ordered that all ABCP holders be placed in a single class of creditors despite the fact that ABCP was issued through a number of different conduits.

> ***ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp., supra*** **at paras 50-54; Book of Authorities of the Applicant, Tab 2**

67. As stated above, in the present matter the Notes were issued through a single conduit pursuant to the terms of a single Trust Indenture. The Noteholders will necessarily have a greater 'commonality of interest' than was the case in the ABCP CCAA Proceedings.

68. The Plan provides a benefit to all Noteholders by implementing a compromise that is common to all of them and which binds each of them. In return, each Noteholder will obtain a distribution in proportion to its holdings. The classification proposed by the Applicant is not prejudicial or unfair to any creditor.

F.7. The Court Should Approve the Releases as Contemplated in the Plan

69. Although not an issue to be determined at the hearing for the Initial CCAA Order, it may be helpful for the Court to foreshadow the law in this regard in the event the Plan is approved by the requisite majority of Noteholders and a sanction hearing is held.

70. The Plan includes a comprehensive release similar in scope to the release granted in the ABCP CCAA Proceedings for the Released Parties. The releases have been included because certain key participants, whose participation is vital to the settlement and the Plan, have made comprehensive releases a condition for their participation. Moreover, many of the Released Parties have made other substantial contributions to facilitate the restructuring without which it would have been difficult, if not impossible, for the restructuring to proceed.[19]

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[19] Lafleur-Ayotte Affidavit, para 46, Application Record, Tab 2.

71. The fairness and reasonableness of the releases are not at issue now. They will be considered at the sanction hearing should the Plan receive the requisite creditor vote. The court should permit the Plan, including the releases, to be put to the creditors for voting.

> ***Re MuscleTech Research and Development Inc.*, (2006) 25 C.B.R. (5th) 231 at para 11; Book of Authorities of the Applicant, Tab 16**

72. The CCAA does not contain any express provisions permitting non-director third-party releases. Nevertheless, it is now well established that in appropriate circumstances a CCAA court has the jurisdiction to include third-party releases in a plan of compromise or arrangement to be sanctioned by the court.

> ***ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587 at para 43; Book of Authorities of the Applicant, Tab 17**
>
> ***Century Services Inc. v. Canada (Attorney General)*, *supra* at para 62; Book of Authorities of the Applicant, Tab 4**
>
> ***Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corporation*, 2013 ONSC 1078 at paras 46-48; Book of Authorities of the Applicant, Tab 18**
>
> ***Re MuscleTech Research and Development Inc.*, (2007) 30 C.B.R. (5th) 59 at paras 23 and 26; Book of Authorities of the Applicant, Tab 19**

73. Third-party releases are appropriate when reasonably connected to the proposed restructuring achieved by the CCAA plan. In *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp*, the Ontario Court of Appeal cited with approval the following findings of the application judge as support for the third-party releases that were approved by the court:

(a) the parties to be released are necessary and essential to the restructuring of the debtor;

(b) the claims to be released are rationally related to the purpose of the Plan and necessary for it;

(c) the Plan cannot succeed without the releases;

(d) the parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan; and

(e) the Plan will benefit not only the debtor companies but creditor Noteholders generally.

***ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (ONCA), *supra* at paras 70-71; Book of Authorities of the Applicant, Tab 17**

74. Each of the above factors are equally applicable in the present matter, which arises out of similar transactions involving the sale of ABCP and the subsequent market collapse in Canada.

75. Barclays, the CDPQ, the Conduit and the Applicant's directors require comprehensive releases similar in scope to the releases provided for in the ABCP CCAA Proceedings in return for their agreement to settle the Litigation and to effect the transactions contemplated by the Settlement Agreement and the Plan. As a condition of these agreements, they require assurance that no claim will remain after the Plan Implementation Date that could lead to claims against them for contribution and indemnity.[20]

76. The Released Parties are or were all direct stakeholders in the Conduit or service providers to the Conduit. They are all involved or affected by the Settlement Agreement and the Plan or are instrumental, directly or indirectly, in the execution of the transactions referred to therein.[21]

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[20] Lafleur-Ayotte Affidavit, para 48, Application Record, Tab 2.

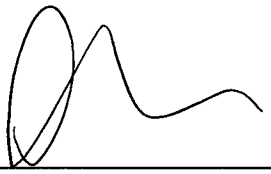
[21] Lafleur-Ayotte Affidavit, para 49, Application Record, Tab 2.

77. The Plan cannot succeed without the participation of the Released Parties and their participation is conditional upon obtaining the releases as contemplated therein.

PART V - RELIEF REQUESTED

78. The Applicant therefore requests that this Application be granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 4th day of July, 2014



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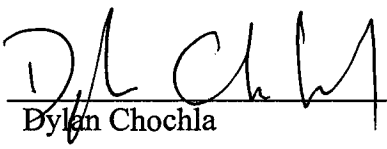

Dylan Chochla

Lawyers for the Applicant

TAB A

SCHEDULE "A"

1. *Re Stelco Inc.*, (2004) 48 C.B.R. (4th) 299
2. *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.,* (2008) 42 C.B.R. (5th) 90
3. Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, *The 2012-2013 Annotated Bankruptcy and Insolvency Act*
4. *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60
5. *Re First Leaside Wealth Management Inc.,* 2012 ONSC 1299
6. *Re Anvil Range Mining Corp.,* (2002) 34 C.B.R. (4th) 157
7. *Toronto Stock Exchange Inc. v. United Keno Hill Mines Ltd.*, (2000) 19 C.B.R. (4th) 299
8. *Re Northland Properties Ltd.*, (1988) 73 C.B.R. (N.S.) 141
9. *Re Lehndorff General Partner Ltd.*, (1993) 17 C.B.R. (3d) 24
10. *Re Canwest Global Communications Corp.*, (2009) 61 C.B.R. (5th) 200
11. *Campeau v. Olympia & York Developments Ltd..*, (1992) 14 C.B.R. (3d) 303
12. *Re Muscletech Research & Development Inc.*, (2006) 19 C.B.R. (5^{th}) 54
13. *Re Canwest Publishing Inc.*, 2010 ONSC 222
14. *Re Canwest Global Communications Corp.*, (2009) 59 C.B.R. (5th) 72
15. *Re SemCanada Crude Company.*, 2009 ABQB 490
16. *Re MuscleTech Research and Development Inc.,* (2006) 25 C.B.R. (5th) 231
17. *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587
18. *Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corporation*, 2013 ONSC 1078
19. *Re MuscleTech Research and Development Inc.*, (2007) 30 C.B.R. (5th) 59

TAB B

SCHEDULE "B"

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

2. Interpretation

"insolvent person" means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

(a) who is for any reason unable to meet his obligations as they generally become due,

(b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or

(c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due;

[...]

"trustee" or "licensed trustee" means a person who is licensed or appointed under this Act.

[...]

Companies' Creditors Arrangement Act, R.S.C., c. C-36

2(1) Interpretation

"company" means any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province, any incorporated company having assets or doing business in Canada, wherever incorporated, and any income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the Bank Act, railway or telegraph companies, insurance companies and companies to which the Trust and Loan Companies Act applies;

"debtor company" means any company that

(a) is bankrupt or insolvent,

(b) has committed an act of bankruptcy within the meaning of the *Bankruptcy and Insolvency Act* or is deemed insolvent within the meaning of the *Winding-up and Restructuring Act*, whether or not proceedings in respect of the company have been taken under either of those Acts,

(c) has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act*, or

(d) is in the course of being wound up under the *Winding-up and Restructuring Act* because the company is insolvent;

[...]

3(1) Application

This Act applies in respect of a debtor company or affiliated debtor companies if the total of claims against the debtor company or affiliated debtor companies, determined in accordance with section 20, is more than $5,000,000 or any other amount that is prescribed.

[...]

11. General power of court

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.

11.02(1) - Stays, etc. - initial application

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 30 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.

[...]

(3) Burden of proof on application

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.

(4) Restriction

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

11.03(1) - Stays - directors

An order made under section 11.02 may provide that no person may commence or continue any action against a director of the company on any claim against directors that arose before the commencement of proceedings under this Act and that relates to obligations of the company if directors are under any law liable in their capacity as directors for the payment of those obligations, until a compromise or an arrangement in respect of the company, if one is filed, is sanctioned by the court or is refused by the creditors or the court.

[...]

11.7(1) Court to appoint monitor

When an order is made on the initial application in respect of a debtor company, the court shall at the same time appoint a person to monitor the business and financial affairs of the company. The person so appointed must be a trustee, within the meaning of subsection 2(1) of the *Bankruptcy and Insolvency Act*.

(2) Restrictions on who may be monitor

Except with the permission of the court and on any conditions that the court may impose, no trustee may be appointed as monitor in relation to a company

(a) if the trustee is or, at any time during the two preceding years, was

(i) a director, an officer or an employee of the company,

(ii) related to the company or to any director or officer of the company, or

(iii) the auditor, accountant or legal counsel, or a partner or an employee of the auditor, accountant or legal counsel, of the company; or

(b) if the trustee is

(i) the trustee under a trust indenture issued by the company or any person related to the company, or the holder of a power of attorney under an act constituting a hypothec within the meaning of the *Civil Code of Quebec* that is granted by the company or any person related to the company, or

(ii) related to the trustee, or the holder of a power of attorney, referred to in subparagraph (i).

[...]

11.51(1) Security or charge relating to director's indemnification

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.

(2) Priority

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

(3) Restriction - indemnification insurance

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.

(4) Negligence, misconduct or fault

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.

11.52(1) Court may order security or charge to cover certain costs

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.

(2) Priority

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

[...]

22(1) Company may establish classes

A debtor company may divide its creditors into classes for the purpose of a meeting to be held under section 4 or 5 in respect of a compromise or arrangement relating to the company and, if it does so, it is to apply to the court for approval of the division before the meeting is held.

(2) Factors

For the purpose of subsection (1), creditors may be included in the same class if their interests or rights are sufficiently similar to give them a commonality of interest, taking into account

(a) the nature of the debts, liabilities or obligations giving rise to their claims;

(b) the nature and rank of any security in respect of their claims;

(c) the remedies available to the creditors in the absence of the compromise or arrangement being sanctioned, and the extent to which the creditors would recover their claims by exercising those remedies; and

(d) any further criteria, consistent with those set out in paragraphs (a) to (c), that are prescribed.

(3) Related creditors

A creditor who is related to the company may vote against, but not for, a compromise or arrangement relating to the company.

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 AND ARRANGEMENT INVOLVING METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS VII CORP. IN ITS CAPACITY AS ISSUER TRUSTEE OF THE DEVONSHIRE TRUST

Court File No: CV-14-10609-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

Proceedings commenced at
Toronto

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