Court File No.: SJM/125/2023

IN THE COURT OF KING'S BENCH OF NEW BRUNSWICK
TRIAL DIVISION
JUDICIAL DISTRICT OF SAINT JOHN

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 SOUTH SHORE SEAFOODS LTD., CAPTAIN COOKE'S SEAFOOD INC., BY THE WATER SHELLFISH (2012) INC., CAN-AM LOBSTER & SHELLFISH LTD., SOUTH SHORE SEAFOODS INTERNATIONAL LTD., BRIDGE LOBSTERS LIMITED, ARSENAULT'S FISH MART INC. (each a "Company' and collectively the "Companies")

BETWEEN: **THE TORONTO-DOMINION BANK**

APPLICANT

- and -

SOUTH SHORE SEAFOODS LTD., CAPTAIN COOKE'S SEAFOOD INC., BY THE WATER SHELLFISH (2012) INC., CAN-AM LOBSTER & SHELLFISH LTD., SOUTH SHORE SEAFOODS INTERNATIONAL LTD., BRIDGE LOBSTERS LIMITED, ARSENAULT'S FISH MART INC.

RESPONDENTS

BRIEF ON LAW
Submitted on Behalf of the Applicant, The Toronto-Dominion Bank
(for the Hearing scheduled for September 21, 2023 at 1:30 p.m.)

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TO: **THE SERVICE LIST**

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TABLE OF CONTENTS

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PART I - BACKGROUND

1. The Applicant is bringing this application to seek relief pursuant to the *Companies' Creditors Arrangement Act* (Canada)[1] ("**CCAA**") in respect of South Shore Seafoods Ltd.

[1] *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 ["**CCAA**"].

("**SSSL**"), Captain Cooke's Seafood Inc. ("**CCSI**"), By the Water Shellfish (2012) Inc. ("**BTW**"), Can-Am Lobster & Shellfish Ltd. ("**Can-Am**"), South Shore Seafoods International Ltd. ("**SSSI**"), Bridge Lobsters Limited ("**Bridge**") and Arsenault's Fish Mart Inc. ("**AFM**" and collectively, the "**Debtors**"). Specifically, the Applicant seeks the granting of: (a) an initial order (the "**Initial Order**"); (b) a charging order (the "**Charging Order**"); and (c) a sealing order (the "**Sealing Order**" and collectively, the "**CCAA Orders**").

2. The Debtors are insolvent and have outstanding liabilities of over $55 million.

3. The Applicant is the Debtors' senior secured operating lender and it, alone, is owed in excess of $26 million.[2]

4. The primary purpose of the CCAA proceedings is to provide a forum for the conduct of a sales investment and solicitation process ("**SISP**") with a view to maximizing value for all stakeholders.[3]

5. Capitalized terms used in this factum and not otherwise defined have the meaning given to them in the affidavit of Andrea Jamnisek sworn September 18, 2023.

PART II - FACTS

6. The Debtors are a group of privately-held companies carrying on business as buyers, processors and wholesalers of live and cooked lobster in Atlantic Canada. SSSL was established in 1996 as one of the first Canadian lobster processors in the province of Prince Edward Island

[2] Affidavit of Andrea Jamnisek sworn September 18, 2023 ["**Jamnisek Affidavit**"], para 3.
[3] Jamnisek Affidavit, para 5.

("**PEI**"). The current shareholders, Timothy Williston and Michel Jacob, acquired the Debtors through several transactions between 2019 and 2021.[4]

The Applicant

7. The Applicant is a federally regulated Canadian bank with its principal place of business in Toronto, Ontario.[5]

The Debtors

8. The Debtors consist of a group of companies all of which are owned (directly or indirectly) by two shareholders: Timothy Williston and Michel Jacob, who are also the sole directors of the Debtors.[6]

9. The operating Debtors consist of SSSL, CCSI, BTW and AFM. The operating Debtors purchase and process lobster primarily from their various locations in PEI.[7]

10. The Debtors' management office is located in Cap-Pelé, New Brunswick. Mr. Williston and Mr. Jacob along with the Debtors' chief financial officer are all located in New Brunswick.[8]

11. The Debtors own and lease property in PEI, Nova Scotia and New Brunswick.[9]

12. The Debtors employ approximately 300 employees including management, 20 full time employees and 240 part time or seasonal employees, the majority of whom are temporary foreign

[4] Jamnisek Affidavit, para 11.
[5] Jamnisek Affidavit, para 7.
[6] Jamnisek Affidavit, para 9.
[7] Pre-Filing Report of the Proposed Monitor, Deloitte Restructuring Inc. dated September 18, 2023 ["**Pre-Filing Report**"], para 20.
[8] Jamnisek Affidavit, para 10.
[9] Jamnisek Affidavit, paras 12-15.

workers. None of Debtors' employees are unionized. The Debtors do not maintain any registered pension plans.[10]

Cash Management

13. The Debtors maintain a centralized cash management system through various accounts held with the Applicant (the "**CMS**").[11]

14. Most payments and transfers are being directed from the accounting office located in Cap-Pelé, NB. The only instance where payments are not physically processed in Cap-Pelé relate to payments to fishers which are processed in PEI at AFM. Each Debtor (except for Bridge and AFM) maintains two locked deposit accounts (Canadian dollar and US dollar) (the "**Locked Accounts**") and two unlocked payment accounts (Canadian dollar and US dollar). All collections from customers must be made to one of the Locked Accounts, and disbursements from these Locked Accounts are controlled by the Applicant. Periodically, the Debtors request advances from the Applicant for funds to be added to the unlocked payment accounts such as to facilitate payments. Certain Debtors, specifically SSSL, BTW, CCSI and CanAm, maintain locked treasury deposit accounts and unlocked treasury payment accounts located in the US. These accounts are held with the Applicant and operate similarly to the Canadian domiciled accounts. These accounts are primarily utilized to facilitate collections from US customers. Funds collected into locked treasury deposit accounts are periodically swept to locked accounts in Canada.[12]

[10] Jamnisek Affidavit, para 16.
[11] Pre-Filing Report, para 23(i).
[12] Pre-Filing Report, para 23(ii)-(iii).

Liabilities

The TD Credit Agreement

15. Pursuant to the Credit Agreement, the Applicant made certain credit facilities available to SSSL, CCSI, BTW and Can-Am. The other Debtors, being SSSI, Bridge and AFM, are guarantors under the Credit Agreement. The Credit Agreement is an asset-based loan through which revolving and term loans were made available to the Borrowers.[13]

16. The obligations of the Debtors under the Credit Agreement are secured pursuant to comprehensive security on all of the Debtors' assets other than certain temporary worker housing.[14]

17. The Debtors' current outstanding obligations owing to the Applicant are as follows:

(a) $12,725,516.67 in respect of Revolving Loans (including a $2.5 million Overadvance but excluding interest and fees);

(b) $13 million in respect of the Term Loan; and

(c) $28,081.04 in respect of the VISA facility.[15]

Other Lender Liabilities

18. In addition to the Applicant, the Lenders have approximately $17 million of long term secured and unsecured loan obligations owing to various parties and $12.8 million of trade payables outstanding.[16]

[13] Jamnisek Affidavit, para 18.
[14] Jamnisek Affidavit, paras 21-22.
[15] Jamnisek Affidavit, para 20.
[16] Pre-Filing Report, paras 26-28.

Defaults and Events Leading up to the Application

Financial Difficulties and the Overadvance

19. The Borrowers have been in default of their obligations under the Credit Agreement from almost immediately after the time the Original Credit Agreement was entered into. In addition to various reporting and covenant defaults, in late February or early March 2023, the Debtors determined that their inventory was overstated by approximately $2.7 million, resulting in an over advance (the "**Overadvance**") under the Credit Agreement.[17]

20. The Applicant agreed to enter into the Forbearance Agreement for the period up to August 31, 2023 to provide the opportunity for the Debtors, with their advisor Bonfire, to improve operations with the view to eliminating the Overadvance.[18]

21. The Debtors were unable to achieve their operational goals and the Overadvance was not materially reduced.[19]

The DIP Facility Agreement

22. The Applicant is no longer willing to provide the Debtors with financing with no clear process or timeline for resolution. Through a CCAA process, the Applicant will continue to provide liquidity to the Debtors for working capital purposes and to fund the restructuring process.[20]

23. The Debtors have consented to the commencement of proceedings pursuant to the CCAA.[21]

[17] Jamnisek Affidavit, paras 30 and 32.
[18] Jamnisek Affidavit, para 37.
[19] Jamnisek Affidavit, paras 38.
[20] Jamnisek Affidavit, paras 43-44.
[21] Jamnisek Affidavit, para 39.

24. In connection with the proposed CCAA proceedings, the Applicant has agreed to continue to provide financial support to the Debtors to fund their operations and the restructuring proceedings pursuant to a second forbearance and fourth amendment to the credit agreement dated as of September 18, 2023 (the "**DIP Facility Agreement**").[22]

25. The DIP Facility Agreement provides the terms on which the Applicant will continue to support the Debtors and their operations during the proposed CCAA Forbearance Period (defined below). The key terms of the DIP Facility Agreement include the following:[23]

(a) Parties: (i) The Borrowers, as borrowers; (ii) the Guarantors, as guarantors; and (iii) the Applicant, as Lender;

(b) CCAA Forbearance Period*:* The Applicant agrees to forbear against the Debtors until the earlier of (i) February 2, 2024; and (ii) the occurrence of a Terminating Event (defined in the DIP Facility Agreement);

(c) Maximum Borrowing Limit: Upon granting of the Initial Orders, $3 million to be increased to $10 million upon the granting of the Comeback Orders (defined below);

(d) Interest: Advances will accrue interest at Prime Rate or US Base Rate plus 1%;

(e) Use of Funds: To be used in accordance with the Approved Cash Flow and which provides for, among other things, payment of the BDC Equipment User Fee and interest on the BDC Mortgage Loan;

[22] Jamnisek Affidavit, para 58.
[23] Capitalized terms used in this paragraph and not otherwise defined have the meaning given to them in the DIP Facility Agreement.

(f) Maturity: The earlier of (i) February 2, 2024; and (ii) the occurrence of a Terminating Event;

(g) Terminating Events: The Lender may terminate the Forbearance Period upon the occurrence of a Terminating Event. Certain of the key Terminating Events include (i) if any cash flow projection or forecast provided to the Applicant is not acceptable to the Applicant, acting reasonably; (ii) if the proposed Initial Orders are not granted on or before September 21, 2023; (iii) if the Comeback Orders, including approval of the SISP, are not granted on or before September 28, 2023; or (iv) if any of the SISP Milestones are not met and achieved;

(h) Security: Obligations under the DIP Facility Agreement will be secured by a super-priority DIP Charge (defined below) subject to certain exceptions.[24]

26. The DIP Facility Agreement provides that the existing CMS will continue to be used during the course of the CCAA proceedings. As a result, given the nature of the asset-based Revolving Loans, as receivables are collected, they will be swept by the Applicant and applied to existing obligations owing under the Revolving Loans. The Debtors will then borrow funds under the DIP Facility Agreement, which advances will be made to fund working capital and restructuring costs but will not be used to repay existing obligations under the Credit Agreement.[25]

PART III - ISSUES

27. The issues to be determined in connection with this application are as follows:

(a) Do the Debtors meet the criteria for relief under the CCAA;

[24] Jamnisek Affidavit, para 59.
[25] Jamnisek Affidavit, para 60.

(b) Should the Court exercise its discretion to grant the stay of proceedings;

(c) Should the Court appoint the proposed Monitor;

(d) Should the Court approve the retention of the CRO;

(e) Should the Court grant the proposed Charges; and

(f) Should the Court grant the Sealing Order.

PART IV - LAW & ARGUMENT

A. The CCAA Applies

The Applicant has Standing to Bring the Application

28. Pursuant to section 9(1) of the CCAA, the commencement of proceedings pursuant to the CCAA must be made by the filing of an application to the court.[26] The CCAA does not require that the application be filed by the debtor company. It is well established that creditors may bring an application for an initial order under the CCAA in respect of a debtor company.[27] In *Miniso International Hong Kong Limited v. Migu Investments Inc.,* Justice Fitpatrick notes:

> The commencement of CCAA proceedings is a proper exercise of creditors' rights where, ideally, the CCAA will preserve the going-concern value of the business and allow it to continue for the benefit of the "whole economic community", including the many stakeholders here. This is intended to allow stakeholders to avoid losses that would be suffered in an enforcement and liquidation scenario.[28]

29. The Applicant is the senior creditor of the Debtors with the primary economic interest in the Debtors. While it would be open for the Applicant to bring an application for the appointment

[26] CCAA, s 9(1).
[27] See e.g. *MJardin Group, Inc. (Re)*, 2022 ONSC 3338 (CanLII) at para 21; *Miniso International Hong Kong Limited v Migu Investments Inc.*, 2019 BCSC 1234 (CanLII) ["***Miniso***"] at para 45.
[28] *Miniso*, *supra* at para 47.

of a receiver, it has chosen to bring this application for the commencement of CCAA proceedings with the goal of maximization of value and preservation of the going concern.[29]

The Debtors are Debtor Companies to which the CCAA Applies

30. Relief under the CCAA is available to a "debtor company" or affiliated "debtor companies" where the total claims against such company or affiliated companies exceed $5 million.[30]

31. The CCAA defines a "company" to include any incorporated company having assets in Canada.[31] A "debtor company" includes any company that is "bankrupt or insolvent".[32] A financially troubled company is insolvent for the purposes of the CCAA if it is "reasonably expected to run out of liquidity within a reasonable proximity of time as compared with the time reasonably required to implement a restructuring."[33]

32. The Debtors are insolvent.[34] They have outstanding obligations in excess of $55 million.[35] The Debtors have received multiple demand letters.[36] The Forbearance Agreement with the Applicant has expired – absent further accommodation in connection with these proceedings, all obligations and liabilities owing to the Applicant would be due and payable immediately.[37] The Debtors have approximately $12.8 million of trade debt which they are unable to pay in the ordinary course of business.[38]

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[29] Jasmnisek Affidavit, paras 5 and 36.
[30] CCAA, s 3(1).
[31] CCAA, s 2(1).
[32] CCAA, ss 2 and 3.
[33] *Stelco Inc. (Re),* 2004 CanLII 24933 (ON SC) at para 26.
[34] Jamnisek Affidavit, para 44.
[35] Pre-Filing Report, paras 26-29.
[36] Jamnisek Affidavit, paras 25 and 36.
[37] Jamnisek Affidavit, para 40.
[38] Pre-Filing Report, para 26.

The Court has Jurisdiction to hear the Application

33. Applications under the CCAA must be made to "the court that has jurisdiction in the province within which the head office or chief place of business of the company in Canada is situated, or, if the company has no place of business in Canada, in any province within which any assets of the company are situated."[39]

34. This Court has jurisdiction to hear the application. Among other things:

(a) The Debtors' executive management office is located in Cap-Pelé, New Brunswick;[40] and

(b) The Debtors' shareholders, officers and directors are all located in New Brunswick.[41]

35. The Applicant, with the assistance of the Debtors and the proposed Monitor, has complied with the requirements set out in section 10(2) of the CCAA. Specifically:

(a) a projected cash flow of the Debtors has been filed setting out such amounts on a weekly basis, together with the required accompanying report to the cash flow;[42] and

(b) the most recent financial statements for each of the Debtors have been included in the record.[43]

[39] CCAA, s 9(1).
[40] Jamnisek Affidavit, para 10; Pre-Filing Report, para 21.
[41] Jamnisek Affidavit, para 10; Pre-Filing Report, para 21.
[42] Cash Flow Statement, Appendix "B" to the Pre-Filing Report.
[43] Financial Statements of the Debtors, Jamnisek Affidavit, Exhibits "B" to "H".

B. The Discretion of the Court

36. Relief under the CCAA should be granted if it accords with the remedial purposes of the CCAA, which include rehabilitation, the avoidance of social and economic loss resulting from liquidation, and the building of consensus among interested stakeholders.[44]

37. An initial order may include any relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course during the restructuring period.[45]

C. The Stay of Proceedings Should be Granted

38. The Court may grant a stay of proceedings for up to 10 days in respect of the initial application provided that it is satisfied that it is appropriate in the circumstances.[46]

39. The stay of proceedings ensures that creditor enforcement does not interfere with the company's ability to maintain operations while restructuring its affairs.[47] The stay of proceedings maintains the status quo while the company develops a plan for the benefit of its creditors.[48]

40. The threshold for a debtor company to obtain a stay of proceedings under the CCAA is low. The company only has to satisfy the Court that a stay of proceedings would "usefully further" its efforts to reorganize.[49]

41. A debtor company is expected to act in good faith and with due diligence both before and after the commencement of proceedings under the CCAA; however, any in-depth analysis of good faith and due diligence is ordinarily deferred to subsequent applications.[50]

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[44] *Century Services Inc. v Canada (Attorney General)*, 2010 SCC 60 (CanLII) ["***Century Services***"] at paras 15, 59 and 70.
[45] CCAA, s 11.02(1).
[46] CCAA, s 11.02(1).
[47] CCAA, s 11.02.
[48] *Re Lehndorff*, [1993] OJ No 14, 17 CBR (3d) 24 (Ont Ct J (Gen Div [Comm List]) at paras 5-6.
[49] *Century Services*, *supra* at para 70; *Industrial Properties Regina Limited v Copper Sands Land Corp.*, 2018 SKCA 36 (CanLII) ["***Industrial Properties***"] at para 21.
[50] *Industrial Properties*, *supra* at paras 22-23.

42. The Debtors have worked in good faith and with due diligence in a cooperative manner with the proposed Monitor and the Applicant in connection with the Applicant's application for these proceedings.[51]

D. Deloitte Should be Appointed as Monitor

43. Deloitte has consented to acting as Monitor.[52]

44. Deloitte is a licenced trustee within the meaning of section 2(1) of the *Bankruptcy and Insolvency Act*[53] and has consented to act as Court-appointed Monitor of the Debtors. Deloitte is qualified to act in such capacity under section 11.7 of the CCAA.[54] Deloitte is not subject to any of the restrictions set out in section 11.7(2) of the CCAA on who may be appointed as Monitor.[55]

45. Deloitte has obtained a detailed understanding of the Debtors' businesses as it has been engaged as financial advisor to the Applicant since March 17, 2023 and has spent time with management in preparation for these proceedings.[56]

46. The powers proposed to be granted to the Monitor in the Initial Order are consistent with those set out in the Model Order.[57]

E. The Appointment of the CRO is Appropriate

47. The Debtors have retained David Boyd, a representative of Resolve Advisory Services Ltd. ("**Resolve**"), as a chief restructuring officer ("**CRO**") to assist them through the restructuring period.[58] Courts have held that the appointment of a CRO is appropriate as such expertise will assist the debtor in achieving the objectives of the CCAA.[59] The jurisdiction of the Court to appoint

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[51] Pre-Filing Report, para 48.
[52] Jamnisek Affidavit, para 49. Consent to Act as Monitor, Appendix "A" to the Pre-Filing Report.
[53] *Bankruptcy and Insolvency Act*, RSC, 1985, c B-3, s 2(1).
[54] CCAA, s 11.7.
[55] Jamnisek Affidavit, para 50.
[56] Pre-Filing Report, para 12.
[57] Notice of Application dated September 18, 2023, Schedule "B".
[58] Jamnisek Affidavit, para 48.
[59] *Walter Energy Canada Holdings, Inc. (Re)*, 2016 BCSC 107 (CanLII) at paras 26-31.

a CRO falls within the Court's jurisdiction to make any order it deems appropriate in the circumstances.

48. Mr. Boyd has the necessary background and qualifications to act as CRO of the Debtors. Prior to founding Resolve, Mr. Boyd spent approximately 28 years with a national restructuring firm and has previous experience in restructuring mandates under the CCAA. Mr. Boyd is a Fellow Chartered Professional Accountant, a Fellow Chartered Accountant, a Chartered Insolvency and Restructuring Professional, a Licensed Insolvency Trustee and a member of the Insolvency Institute of Canada.[60]

F. The Proposed Court-Ordered Charges are Necessary and Appropriate

49. The Applicant is seeking approval of three priority charges as part of the Initial Orders, as discussed below (the **Charges**). The Charges are necessary and appropriate in the circumstances to allow the restructuring proceedings to proceed.

The Administration Charge

50. The Applicant is seeking the Administration Charge in favour of the proposed Monitor, the proposed Monitor's counsel, the Applicant's counsel, the CRO and the Debtors' counsel (to a maximum of $25,000) to secure payments of their reasonable fees and disbursements incurred both prior to filing and after in the initial maximum amount of $250,000.[61]

51. Section 11.52 of the CCAA expressly provides that the Court has jurisdiction to grant an administration charge where it concludes that (a) the notice has been given to the secured

[60] Pre-Filing Report, para 66.
[61] Jamnisek Affidavit, para 64(a); Pre-Filing Report, paras 72-73.

creditors likely to be affected by the charge; (b) the amount is appropriate; (c) the charges should extend to all of the proposed beneficiaries.[62]

52. In *Re Canwest Global Communications Corp*.[63] and *Re Canwest Publishing Inc*.,[64] administration charges were granted pursuant to section 11.52(1). In *Canwest Publishing*, Justice Pepall provided a non-exhaustive list of factors to be considered in approving an administration charge, including:

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

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

(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.[65]

53. The Administration Charge is appropriate in the circumstances:

(a) The beneficiaries of the charge will provide the required legal and financial advice during the course of these proceedings;

(b) There is no anticipated duplication of roles; and

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[62] CCAA, s 11.52.
[63] *Re Canwest Global Communications Corp.*, 2009 CanLII 55114 (ON SC) ["***Canwest Global***"] at para 40.
[64] *Re Canwest Publishing Inc.*, 2010 ONSC 222 (CanLII) ["***Canwest Publishing***"] at para 54.
[65] *Canwest Publishing*, *supra* at para 54.

(c) The proposed Monitor has indicated it believes the amount of the Administration Charge is appropriate in the circumstances.

The Directors' Charge

54. The Applicant has agreed to seek the Directors' Charge in favour of the officers and directors of the Debtors in the amount of $375,000. This represents an estimate of accruals of amounts that are potentially director liability obligations between payment cycles.[66]

55. As at the current date, wages, vacation pay and statutory employee deductions are accruing in the ordinary course with no arrears due and unpaid as at the date hereof.[67]

56. Pursuant to section 11.51 of the CCAA, the Court has specific authority to grant a charge to the directors and officers of a company as security for an indemnity provided by the company in respect of certain statutory obligations. In order to grant such a charge, the Court must be satisfied that (a) notice has been given to the secured creditors likely to be affected by the charge; (b) the amount is appropriate; (c) the Debtors could not obtain adequate indemnification insurance at reasonable cost; and (d) the charge does not apply in respect of any obligation incurred by a director or officer as a result of the director's or officer's gross negligence or wilful misconduct.[68]

57. The Debtors do not maintain directors' and officers' insurance. The Debtors are unlikely to have sufficient funds available to satisfy any contractual indemnities to the directors or officers should the directors or officers need to call upon those indemnities.[69]

[66] Jamnisek Affidavit, para 64(b); Pre-Filing Report, paras 77-81.
[67] Jamnisek Affidavit, para 53.
[68] CCAA, s 11.51.
[69] Jamnisek Affidavit, para 56; Pre-Filing Report, para 79.

58. The proposed Monitor believes the quantum of the charge is reasonable in view of the potential liabilities faced by these directors and officers in the post-filing period.[70]

The DIP Financing and DIP Charge

59. The Applicant is seeking authorization for the Debtors to continue to borrow funds pursuant to the DIP Facility Agreement during the pendency of the CCAA Proceedings.[71]

60. The Applicant is seeking a priority charge to secure obligations of the Debtors' under the DIP Facility Agreement (the "**DIP Charge**").[72] If the DIP Charge is not granted as part of the Initial Orders, the Applicant has the right to terminate the DIP Facility Agreement.[73]

61. The proposed DIP Charge will rank subsequent to the Administration Charge and the Directors' Charge but rank in priority to all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise – provided that the DIP Charge will not rank in priority to the Business Development Bank of Canada in respect of any BDC Priority Loans and BDC Priority Collateral (as both terms are defined in the DIP Facility Agreement) or in respect of any Crown claims which have priority in bankruptcy.[74]

62. In determining whether to grant a charge to secure the interim financing sought, it is submitted that the Court should review the following factors described in section 11.2 of the CCAA:

(a) whether notice has been given to secured creditors who are likely to be affected by the subject charge;

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[70] Pre-Filing Report, paras 79-80.
[71] Jamnisek Affidavit, para 58; Pre-Filing Report, paras 60-64.
[72] Jamnisek Affidavit, para 64(c); Pre-Filing Report, para 82.
[73] Jamnisek Affidavit, para 59(g).
[74] Jamnisek Affidavit, para 65; Pre-Filing Report, para 71.

(b) whether the amount of the interim financing to be secured by the charge is appropriate and necessary having regard to the Applicant's cash flow statement;

(c) whether the charge secures an obligation that would exist before the order is made; and

(d) the enumerated factors in subsection 11.2(4) of the CCAA.[75]

63. The Applicant has or will provide notice to all parties whose interests may be affected by the proposed DIP Charge.[76]

64. The DIP Facility Agreement will provide the Debtors with essential funding to continue operations while the CCAA proceedings progress and the SISP is conducted. The proposed initial maximum borrowing amount is $3 million, the requirement for which is set out in the Approved Cash Flow.[77]

65. As set out above, although the proposed DIP Charge does not secure any pre-filing obligations, under the DIP Facility Agreement, it is proposed that as the Debtors collect receipts, they will use collections to continue to pay down the pre-filing Revolving Loans owing to the Applicant, while drawing under the DIP Facility Agreement to fund their operations and the restructuring costs during the CCAA proceedings.[78] This is sometimes referred to as a "creeping" roll up DIP.

[75] CCAA, s 11.2.
[76] Notice of Application, Schedule "A" – Service List.
[77] Pre-Filing Report, paras 82-83. Cash Flow Statement, Appendix "B" to the Pre-Filing Report.
[78] Jamnisek Affidavit, para 60; Pre-Filing Report, para 60.

66. Courts have granted DIP facilities structured to allow debtors to use their post-filing operating receipts to reduce the balance of a pre-existing asset-based revolving credit facility in accordance with the debtor's existing practices if it does not offend section 11.2 of the CCAA.[79]

67. In *Re: Performance Sports Group Ltd*.[80], the Court states:

> Section 11.2(1) of the CCAA provides that security for a DIP facility may not secure an obligation that existed before the order authorizing the security was made. The effect of this provision is that advances under a DIP facility may not be used to repay pre-filing obligations. In this case, the ABL DIP Facility is a revolving facility. Under its terms, receipts from operations of the PSG Entities post-filing may be used to pay down the existing ABL Facility. The applicants submit that in this case, the ABL DIP Facility preserves the pre-filing status quo by upholding the relative pre-stay priority position of each secured creditor. By requiring that the PSG Entities only use post- filing cash receipts to pay down the accrued balance under the revolving credit facility, the ABL DIP Lenders are in no better position with respect to the priority of their pre-filing debt relative to other creditors. I accept that no advances under the ABL DIP Facility will be used to pay pre-filing obligations and there has been inserted in the Initial Order a provision that expressly prevents that. The provision that receipts from operations of the PSG Entities post-filing may be used to pay down the existing ABL Facility is approved.[81]
>
> [Emphasis added]

68. Courts have considered several non-exhaustive factors in approving asset-based DIP facilities structured in this manner:

(a) Whether the DIP facility only authorizes the debtor to pay pre-filing debts owing to the DIP Lender(s) out of operating cash receipts;

(b) Whether the DIP facility prohibits the debtor from using DIP proceeds to pay down pre-filing indebtedness; and

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[79] See e.g. *Gesco Industries Inc. (Re)*, 2023 ONSC 3050 (Endorsement of Penny J.) ["***Gesco***"].
[80] *Performance Sports Group Ltd. (Re)*, 2016 ONSC 6800 (CanLII).
[81] *Performance Sports*, *supra* at para 22.

(c) Whether payments to the DIP lender regarding its pre-filing debt are made in a manner consistent with the pre-filing status quo.[82]

69. Under the proposed Charging Order and the DIP Facility Agreement, the Debtors are specifically prohibited from using advances to repay any pre-filing indebtedness under the Credit Agreement.[83] The repayment of amounts under the Revolving Loans is consistent with the pre-filing status quo.

70. The Court should consider the following when considering subsection 11.2(4) of the CCAA: (a) the period during which the Debtors are expected to be subject to proceedings under the CCAA; (b) how the Debtors' business and financial affairs are to be managed during the proceedings; (c) whether the Debtors' management has the confidence of its major creditors; (d) whether the DIP Financing would enhance the prospects of a viable compromise or arrangement; (e) the nature and value of the Applicant's property; (f) whether any creditor would be materially prejudiced as a result of the security or charge; and (g) the proposed Monitor's report.[84]

71. In the present circumstances:

(a) Absent the occurrence of a Terminating Event, the proposed funding under the DIP Facility Agreement will be made available through the projected outside closing date under the SISP (i.e. February 2, 2024);[85]

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[82] *Comark Inc. (Re)*, 2015 CarswellOnt 20810, 2015 ONSC 2010, 266 A.C.W.S. (3d) 541 at paras 40-41; *Performance Sports*, *supra* at para 22; *Medipure Pharmaceuticals Inc. (Re)*, 2022 BCSC 1771 (CanLII) at paras 51-54; *Gesco*, *supra* at paras 25-31.
[83] Jamnisek Affidavit, para 60.
[84] CCAA, s 11.2(4).
[85] Jamnisek Affidavit, para 59(b).

(b) During the CCAA proceedings, the Debtors will be monitored and assisted by the CRO and the Monitor – the Applicant intends to return on the Comeback Hearing to seek approval of further enhanced powers of the Monitor;[86]

(c) Without funding under the DIP Facility Agreement, the Debtors are unlikely to be able to continue operations;[87]

(d) The proposed Monitor supports the granting of the DIP Charge;[88]

(e) The proposed Monitor has indicated that the proposed DIP Charge does not materially prejudice other lenders;[89] and

(f) The Applicant would not provide such funding absent the granting of the DIP Charge.

G. Payment of Pre-Filing Obligations is Appropriate

72. The Debtors have requested that they be authorized, but not required, to pay pre-filing amounts owing to certain creditors that are critical to their business and ongoing operations up to a maximum of $900,000, the majority of which are payments for purchases from fishers, third-party lobster supplies and packaging and transportation service providers incurred on the eve of filing.[90]

73. The Applicant agrees that certain pre-filing claims of critical suppliers are necessary and appropriate, recognizing such payments may only be made with the Monitor's consent. The Court is authorized to grant such relief in the circumstances.[91]

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[86] Jamnisek Affidavit, para 71 (d).
[87] Jamnisek Affidavit, para 43.
[88] Pre-Filing Report, para 85.
[89] Pre-Filing Report, para 63.
[90] Pre-Filing Report, paras 86-87.
[91] CCAA, s 11.4; *Canwest Global*, *supra* at para 41.

H. The Sealing Order is Appropriate

74. The Debtors have requested that the Approved Cash Flow be subject to a sealing order. As such, the unredacted Pre-Filing Report containing the Approved Cash Flow and commentary thereon has been filed under seal.

75. The leading authority for sealing orders is *Sierra Club of Canada v. Canada (Minister of Finance)*,[92] as recently reviewed by the Supreme Court of Canada in *Sherman Estate v. Donovan*.[93] The two-fold test is as follows:

(a) such an order is necessary to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and

(b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.[94]

76. With respect to the first branch of the test, the following elements are to be considered:

(a) the risk must be real and substantial, well grounded in evidence, posing a serious threat to the commercial interest in question;

(b) the important commercial interest must be one which can be expressed in terms of a public interest in confidentiality, where there is a general principle at stake; and

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[92] *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41 (CanLII) [“***Sierra Club***”].
[93] *Sherman Estate v Donovan*, 2021 SCC 25 (CanLII).
[94] *Sierra Club*, *supra* at para 53.

(c) the judge is required to consider not only whether reasonable alternatives are available to such an order but also to restrict the order as much as is reasonably possible while preserving the commercial interest in question.[95]

77. Recent caselaw provides guidance for the appropriateness of sealing of sensitive financial information produced in the context of a CCAA proceeding.[96] In *Groupe Dynamite inc. c. Deloitte Restructuring inc.*, the Court held that it was appropriate to seal the debtor's cash flow statements since public disclosure could jeopardize the debtor's commercial interests, notably due to the potential use of this information by competitors.[97] The Court noted that while the allegations of risk were somewhat general in nature, they were sufficient to warrant a publication ban as contemplated in section 10(3) of the CCAA.[98] Similarly, the Court in *Re Comstock Canada Ltd.* granted a sealing order in respect of the debtor's financial statements on the basis that such information, if available to the public, could adversely affect the debtor and its stakeholders.[99]

78. Like the subject matter of the sealing orders in *Groupe Dynamite* and *Comstock*, the Approved Cash Flow sets out certain financial information as to the Debtors' operations, public disclosure of which the Debtors have advised may have a material detrimental effect on their commercial operations. Such risk is further exacerbated in the present case by the nature of the industry and the Debtors' proportionately large position within it.

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[95] *Sierra Club, supra* at paras 54-57.
[96] See e.g. *Arrangement relatif a Atis Group Inc.*, 2021 CarswellQue 3091 (C.S. Que.) (Initial Order) at para 90; *Arrangement relatif E Cirque du Soleil Canada inc.*, 2020 CarswellQue 7028 (C.S. Que.) (First Day Initial Order) at para 48; *Groupe Dynamite inc. c Deloitte Restructuring inc.*, 2020 CarswellQue 10166 (C.S. Que.) ["***Groupe Dynamite***"] (Initial Order) at para 76; *Index Energy Mills Road Corporation (Re)*, 2017 ONSC 4944 (CanLII); *Comstock Canada Ltd. (Re)*, 2013 ONSC 4756 CanLII) ["***Comstock***"].
[97] *Groupe Dyanmite* (Annex – To the Minutes of the Hearing of September 18, 2020) at para 33.
[98] *Groupe Dynamite* (Annex – To the Minutes of the Hearing of September 18, 2020) at para 33.
[99] *Comstock*, *supra* at paras 60-61.

79. The Applicant, BDC and the Court have had the opportunity to review the Approved Cash Flow. The Applicant believes that an interim sealing order pending the Comeback Hearing is appropriate in the circumstances such that further materials may be filed if required.

PART V - RELIEF SOUGHT

80. For the reasons set out above, the Applicant request the Initial CCAA Orders substantially in the forms attached to the Applicant's notice of application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 4th day of September, 2023.

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SCHEDULE "A"

LIST OF AUTHORITIES

1. *MJardin Group, Inc. (Re)*, 2022 ONSC 3338 (CanLII)
2. *Miniso International Hong Kong Limited v Migu Investments Inc.*, 2019 BCSC 1234 (CanLII)
3. *Stelco Inc. (Re),* 2004 CanLII 24933 (ON SC)
4. *Century Services Inc. v Canada (Attorney General)*, 2010 SCC 60 (CanLII)
5. *Re Lehndorff*, [1993] OJ No 14, 17 CBR (3d) 24 (Ont Ct J (Gen Div [Comm List])
6. *Industrial Properties Regina Limited v Copper Sands Land Corp.*, 2018 SKCA 36 (CanLII)
7. *Walter Energy Canada Holdings, Inc. (Re)*, 2016 BCSC 107 (CanLII)
8. *Re Canwest Global Communications Corp.*, 2009 CanLII 55114 (ON SC)
9. *Re Canwest Publishing Inc.*, 2010 ONSC 222 (CanLII)
10. *Gesco Industries Inc. (Re)*, 2023 ONSC 3050 (Endorsement of Penny J.)
11. *Performance Sports Group Ltd (Re),* 2016 ONSC 6800.
12. *Comark Inc. (Re)*, 2015 CarswellOnt 20810, 2015 ONSC 2010, 266 A.C.W.S. (3d) 541
13. *Medipure Pharmaceuticals Inc. (Re)*, 2022 BCSC 1771 (CanLII)
14. *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41 (CanLII)
15. *Sherman Estate v Donovan*, 2021 SCC 25 (CanLII)
16. *Arrangement relatif a Atis Group Inc.*, 2021 CarswellQue 3091 (C.S. Que.) (Initial Order)
17. *Arrangement relatif E Cirque du Soleil Canada inc.*,, 2020 CarswellQue 7028 (C.S. Que.) (First Day Initial Order)
18. *Groupe Dynamite inc. c Deloitte Restructuring inc.*, 2020 CarswellQue 10166 (C.S. Que.) (Initial Order)
19. *Index Energy Mills Road Corporation (Re)*, 2017 ONSC 4944 (CanLII)
20. *Comstock Canada Ltd. (Re)*, 2013 ONSC 4756 CanLII)
21. *Groupe Dyanmite inc. c Deloitte Restructuring inc.*, 2020 CarswellQue 10166 (C.S. Que.) (Annex – To the Minutes of the Hearing of September 18, 2020)

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

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

Definitions

2 (1) In this Act,

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*, telegraph companies, insurance companies and companies to which the *Trust and Loan Companies Act* applies; (*compagnie*)

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; (*compagnie débitrice*)

Application

3 (1) 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.

Affiliated companies

(2) For the purposes of this Act,

- **(a)** companies are affiliated companies if one of them is the subsidiary of the other or both are subsidiaries of the same company or each of them is controlled by the same person; and
- **(b)** two companies affiliated with the same company at the same time are deemed to be affiliated with each other.
- **Company controlled**

(3) For the purposes of this Act, a company is controlled by a person or by two or more companies if

- **(a)** securities of the company to which are attached more than fifty per cent of the votes that may be cast to elect directors of the company are held, other than by way of security only, by or for the benefit of that person or by or for the benefit of those companies; and
- **(b)** the votes attached to those securities are sufficient, if exercised, to elect a majority of the directors of the company.

Subsidiary

(4) For the purposes of this Act, a company is a subsidiary of another company if

- **(a)** it is controlled by
    - **(i)** that other company,
    - **(ii)** that other company and one or more companies each of which is controlled by that other company, or
    - **(iii)** two or more companies each of which is controlled by that other company; or
- **(b)** it is a subsidiary of a company that is a subsidiary of that other company.

Jurisdiction of court to receive applications

9 (1) Any application under this Act may be made to the court that has jurisdiction in the province within which the head office or chief place of business of the company in Canada is situated, or, if the company has no place of business in Canada, in any province within which any assets of the company are situated.

Publication ban

10 (3) The court may make an order prohibiting the release to the public of any cash-flow statement, or any part of a cash-flow statement, if it is satisfied that the release would unduly prejudice the debtor company and the making of the order would not unduly prejudice the company's creditors, but the court may, in the order, direct that the cash-flow statement or any part of it be made available to any person specified in the order on any terms or conditions that the court considers appropriate.

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.

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.

Critical supplier

11.4 (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 a person to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods or services to the company and that the goods or services that are supplied are critical to the company's continued operation.

Obligation to supply

(2) If the court declares a person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.

Security or charge in favour of critical supplier

(3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied under the terms of the order.

Priority

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

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.

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.

Court to appoint monitor

11.7 (1) 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*.

Restrictions on who may be monitor

(2) 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).

Court may replace monitor

(3) On application by a creditor of the company, the court may, if it considers it appropriate in the circumstances, replace the monitor by appointing another trustee, within the meaning of subsection 2(1) of the *Bankruptcy and Insolvency Act*, to monitor the business and financial affairs of the company.

Bankruptcy and Insolvency Act, RSC, 1985, c B-3

Definitions

2 In this Act,

trustee or **licensed trustee** means a person who is licensed or appointed under this Act.
(*syndic* ou *syndic autorisé*)

2015 ONSC 2010
Ontario Superior Court of Justice

Comark Inc., Re

2015 CarswellOnt 20810, 2015 ONSC 2010, 266 A.C.W.S. (3d) 541

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as Amended

In the Matter of a Proposed Plan of Compromise or Arrangement of Comark Inc.

G.B. Morawetz R.S.J.

Heard: March 26, 2015
Judgment: March 26, 2015
Docket: CV-15-10920-00CL

Counsel: Marc Wasserman, Caitlin Fell, for Applicant
Brian Empey, Ryan Baulke, for Proposed Monitor, Alvarez & Marsal Canada Inc.
Sam Babe, for Salus Capital Partners, LLC (DIP Lender)

***G.B. Morawetz R.S.J.*:**

1 The Applicant, Comark Inc. ("Comark"), brings this application for relief under the *Companies' Creditors Arrangement Act* ("CCAA").

2 Comark operates 343 retail stores across Canada under three distinct divisions: Ricki's, Bootlegger and Cleo (together, the "Banners"). Comark sells predominantly exclusive private label merchandise. Comark employs approximately 3,400 people.

3 Comark is a privately held corporation that is a portfolio company of an investment fund managed by KarpReilly LLC ("KarpReilly"). Comark's corporate headquarters are in Mississauga, Ontario (the "Corporate Headquarters") and employ 83 full time employees. Comark operates an essential distribution centre in Laval, Quebec, which employs approximately 200 people and processes approximately 9.3 million and 2 million units of merchandise each year for stores and online sales, respectively.

4 Comark has over 300 product suppliers, primarily located in Asia and North America. Approximately 80% of Comark's unit purchases were sourced from foreign manufacturers and the remaining 20% were sourced in North America. Purchases are typically made in US dollars.

5 Comark transports all products to its stores through third party transportation companies. Purolator is Comark's primary third party transportation provider. The Applicant is of the view that Purolator's continued services are critical to the company's ongoing operations. Approximately 90% of Comark's products are transported using Purolator.

6 Comark has over 60 third party landlords from which it leases all of its retail and distribution locations. As part of its restructuring under these proceedings, Comark anticipates that it will disclaim certain leases in respect of Comark stores.

7 Comark participates in co-brand community events and cause marketing with charitable organizations. Comark customers have donated amounts intended for various charities, and these donated funds are currently comingled with Comark's other funds. As of March 17, 2015, Ricki's has (Cdn.) $40,057, Bootlegger has (Cdn.) $108 and Cleo has (Cdn.) $107,917 in funds received from customers in respect of donations to various charitable organizations.

8 Comark has experienced declining financial results over the past two years.

9 As of February 28, 2015, Comark had total assets of (Cdn.) $112.4 million and its total indebtedness was approximately (Cdn.) $126.1 million.

10 Comark is financed primarily through a term loan and revolving credit facilities under a credit agreement dated as of October 31, 2014 between Comark, as the lead borrower, and Salus, as administrative collateral agent and lender thereto (the "Salus Credit Agreement").

11 As of March 17, 2015, the Applicant reports that there was approximately U.S.$43.1 million outstanding under the term loan facility and (Cdn.) $24.8 million outstanding under the revolving credit facility (the "Revolving Credit Facility"). The Salus Credit Agreement has a maturity date of October 31, 2018. All of the obligations of Comark under the Salus Credit Agreement are secured by all of Comark's assets.

12 Comark has been noted in default of the Agreement and Salus has made a demand for repayment. Comark advises that it is not able to repay its debt obligations to Salus.

13 Comark reports that its adjusted EBITDA fell to approximately (Cdn.) $16.5 million for the year end February 28, 2015. Comark acknowledges that this constitutes an event of default under the Salus Credit Agreement. On the occurrence of an event of default, Salus has the right to terminate the Salus Credit Agreement and declare that all obligations under it are due and payable with presentment, demand, protest or other notice of any kind.

14 Salus delivered a Reservation of Rights Letter on March 5, 2015. On March 25, 2015, Salus made a demand for repayment for all amounts owing under the Salus Credit Agreement. Comark acknowledges that it is not able to pay the full amount owing under the Salus Credit Agreement, which has become immediately due and payable as a result of the event of default and the demand made by Salus. Comark acknowledges that it is insolvent.

15 The Applicant seeks the granting of an initial order. With the benefit of the protection of the stay of proceedings, Comark is of the view that it will be provided with the necessary "breathing space" in order to allow it to develop a plan to restructure and reorganize the business and preserve enterprise of value.

16 Comark is of the view that it requires interim financing for working capital and general corporate purposes and for post-filing expenses and costs during the CCAA proceedings.

17 Salus has agreed to act as DIP lender (the "DIP Lender") and provide an interim financing facility (the "DIP Facility") under an amended and restated credit agreement with Salus (the "DIP Agreement"). It is a condition of the DIP Agreement that advances made to Comark be secured by a court ordered security interest, lien and charge over all of the assets and undertakings of Comark (the "DIP Lender's Charge").

18 The Applicant advises that under the draft initial order, the charges, including the DIP Lender's Charge, do not prime TD Bank and creditors with a purchase money security interest, which are Comark's only secured creditors. Further, the company advises that it is also an express term of the DIP Agreement that advances made thereunder may not be used to satisfy pre-filing obligations under the Salus Credit Agreement. Further, the company states that the DIP Lender's Charge will not secure any obligation that exists before the date of the initial order.

19 It is anticipated that the proceeds from Comark's operations will be used to reduce pre-filing obligations outstanding under the Salus Revolver Facility in order to free-up availability under the DIP Facility. In accordance with the DIP Facility and the current cash management system in effect, Comark's cash from business operations will be deposited into the blocked account and swept by Salus in order to reduce amounts outstanding under the Salus Revolver Facility prior to the commencement of these proceedings.

20 In his supplementary affidavit, Mr. Bachynski states that Comark requires $15 million during the week ending April 11, 2015 and as such, Comark is proposing a maximum DIP Charge of (Cdn.) $28 in the draft initial order with a restriction on borrowing of (Cdn.) $15 million prior to the proposed comeback hearing scheduled for April 7, 2015.

21 Mr. Bachynski goes on to state that Comark will not be able to satisfy its ordinary course obligations in the CCAA proceedings without the DIP Facility.

22 In its pre-filing report, the Monitor reports at length on the debtor-in-possession financing. In its report, the Monitor states that Salus has exercised cash dominion pursuant to the Blocked Account Agreement and the Salus Credit Agreement and has made demand under the Salus Credit Agreement. As a consequence, the Monitor states that Comark does not have access to liquidity to discharge its financial obligations. Further, given the deterioration in the Applicant's financial position and its current liquidity crisis, the Monitor states that the Applicant cannot continue to operate without the DIP Facility.

23 The Monitor also advises that senior management and the Applicant's advisors believe that the DIP Facility is the only realistic source of funding available, given the urgency of the proposed filing, the position of the lender in the capital structure of the Applicant and the minimal level of Comark's existing cash on hand.

24 At section 9.5 of this report, the Monitor summarizes the DIP Facility Terms. This chart is reproduced below.

Comark
Summary of DIP Facility Terms

Total Availability	• The lesser of: (a) the Maximum Amount of $32 million, (b) the Borrowing Base, or (c) extensions of credit required under and set out in the Budget, plus outstanding principal amount of pre-filing Revolving Credit Facility.
Effective Date	• Date of the Initial Order
Purpose/Permitted Payments	• Limited to amounts set out in the Restructuring Plan and the Budget approved by Salus.
Significant Terms	• Initial Order must be granted and issued and provide for a DIP Lender's Charge; • The establishment of a cash flow budget and a restructuring plan that is satisfactory to the DIP Lender; • The DIP Lender shall have received control agreements with respect to the deposit accounts of the Borrower which effectively provides for a sweeping of the Borrower's gross receipts, such collections are to be applied to reduce pre-filing Revolving Credit Facility; and • Other covenants which appear customary under the circumstances.
Fees and Interest	• Interest Rate per annum: LIBOR + 5.75 (as at March 24, 2015 LIBOR was approximately 0.25%; however, the DP Facility contains a LIBOR floor of 1.00%) • Exit fee of 4% of total outstanding borrowing at exit under the DIP, the pre-filing Revolving Credit Facility and the pre-filing Term Loan Facility • Collateral monitoring fee of US$7,000 per month
Security	• All assets and property of the Borrower and DIP Lender's Charge.
Maturity	• The earliest of: (i) completion of a transaction in compliance with the SISP; and (ii) a default.
DIP Lender's Charge	• DIP Lender's Charge to rank subordinate only to the Administration Charge and the Directors' Charge (all further defined herein). DIP Lender's Charge in amount of $32 million to ensure fees, costs and expenses are covered.

25 The DIP Facility contains various affirmative covenants, negative covenants, events of default and conditions that, in the proposed Monitor's view, are reasonable and customary for this type of financing.

26 The Monitor further comments that the DIP Facility is not a new facility layered on top of the pre-filing credit facilities, rather it is an amended version of the pre-filing Salus Credit Agreement pursuant to which Salus would be prepared to commence to provide liquidity, despite the prior default. Importantly, the Monitor comments that ultimately, the DIP Facility will not result in a greater level of secured debt than was contemplated under the pre-filing facilities (absent the default that occurred). Furthermore, the Monitor reports that as there is no indication of any deficiencies with Salus' security package, and the Applicant has advised that it does not intend that the DIP Lender's Charge prime any other secured party's purchase money security interests or statutory deemed trusts, the fact that the DIP Lender's Charge will increase while the pre-filing Revolving Credit Facility would be paid down, should have no negative impact on the other stakeholders.

27 The proposed Monitor recommends that the Court approve the DIP Facility. In arriving at this recommendation, the proposed Monitor considered:

(i) the facts and circumstances of the Applicant;

(ii) section 11.2(4) of the CCAA;

(iii) the financial terms of the DIP Facility relative to comparable facilities and the fact that it is the only realistic source of funding available given the urgency of the proposed filing, the prominent position of the Lender in the capital structure of the Applicant and the minimal level of Comark's existing cash on hand;

(iv) the stability and flexibility of the DIP Facility will provide to ensure there is sufficient liquidity to facilitate the CCAA proceedings and a Sale and Investment Facilitation Process ("SISP"), to maximize realization; and

(v) the interests of the Applicant's stakeholders.

28 In providing its recommendation, the proposed Monitor specifically stated that it has considered the provisions of section 11.2(1) of the CCAA which prohibit the DIP Lender's Charge from securing an obligation that exists before the requested order is made. The Monitor reports that having consulted with its counsel, it is of the view that since the pre-filing Revolving Credit Facility is being reduced by the use of the Applicant's cash generated from its business, the DIP Lender's Charge is only securing advances made post-filing under the DIP Facility.

29 For the purposes of this application, I accept the foregoing submissions and recommendation of the Monitor and, specifically, its view that the form of DIP Facility being proposed, does not contravene the provisions of section 11.2(1) of the CCAA.

30 Comark proposes a key employee retention plan (the "KERP") for certain employees (the "Key Employees") which Comark considers critical to a successful proceeding under the CCAA. Key Employees include certain key senior management employees, both at the Corporate Headquarters and Banner level that possess unique professional skills and experience with Comark's business and operations.

31 The proposed Monitor agrees that the KERP is reasonable in the circumstances.

32 The Applicant has retained Houlihan Lokey Capital, Inc. as financial advisor (the "Financial Advisor") to advise on a possible restructuring, refinancing or sale for Comark.

33 The Applicant also reports that it has worked with the Financial Advisor, in consultation with the proposed Monitor and Salus, to develop the Sale and Investor Solicitation Process ("SISP"). The purpose of the SISP is to solicit and assess available opportunities for the acquisition of or investment in Comark's business and property.

34 In its factum, the Applicant submits that the application addresses the following issues:

(a) the Applicant's entitlement to seek protection under the CCAA;

(b) the Applicant's entitlement to a stay of proceedings;

(c) the granting of the DIP Lender's Charge on a priority basis over the property and approval of the DIP Facility;

(d) the approval of the KERP and KERP Charge;

(e) the sealing of the KERP Schedule;

(f) the granting of the Director's Charge on a priority basis over the property;

(g) the approval of pre-filing payments to "critical" suppliers and to certain charitable organizations to which Comark's customers donated funds; and

(h) the approval of the SISP.

35 I am satisfied that Comark meets the definition of "debtor company" under the CCAA. It is a corporation incorporated under the *Canada Business Corporations Act*.

36 I am also satisfied that the total claims against Comark far exceed $5 million and that Comark is insolvent.

37 In arriving at the conclusion that Comark is insolvent, I have taken into account that, as a result of the event of default and the acceleration of all amounts due under the Salus Credit Agreement, it is apparent that Comark does not have sufficient liquidity to satisfy its liabilities as they become due.

38 The required financial statements and cash-flow statements are included in the record.

39 I am also satisfied that the Applicant is entitled to a stay of proceedings pursuant to section 11.02 of the CCAA.

40 With respect to the request to approve the DIP Facility and to grant a DIP Financing Charge on a priority basis, the authority to approve same is found in section 11.2 of the CCAA. In its factum, the Applicant specifically references section 11.2(1) and submits that it is clear on the facts that the DIP Lender's Charge meets this requirement. Counsel submits that the DIP Facility expressly provides that Comark may not use any advances under the DIP Facility to repay pre-filing obligations. Counsel goes on to state that to the extent that Salus is repaid pre-filing amounts owing to it, this repayment will be made from operational receipts as a result of lending, security and enforcement arrangements in place prior to the CCAA filing. Further, the repayment is not made out of proceeds of the DIP Facility. Rather, the payments to Salus simply maintain the status quo as of the CCAA filing date under the existing Salus asset-based lending credit facility.

41 For the purposes of this application, I accept the submissions of the Applicant and recommendations of the Monitor and have concluded that the DIP Facility should be approved and the Court should grant the DIP Lender's Charge to a maximum DIP Charge of (Cdn.) $28 million with a restriction on borrowing of (Cdn.) $15 million up to April 7, 2015.

42 Counsel to the Applicant requests approval of the KERP and the KERP Charge. Submissions in support of this request are made at paragraphs 26 - 32 of the Amended Factum. I accept these submissions and approve the KERP and the granting of the KERP Charge.

43 Insofar as the KERP Schedule contains confidential personal information, the Applicant seeks a sealing of the KERP Schedule. The Applicant references *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 (S.C.C.), in support of its request to seal the Schedule.

44 I am satisfied, having considered the *Sierra Club* principles, that it is appropriate to seal the confidential KERP Schedule.

45 The Applicant also seeks a Directors Charge in the amount of up to (Cdn.) $3 million, to act as security for indemnification obligations for Comark's directors' potential liabilities. It is contemplated that the Directors Charge would stand in priority to the proposed DIP Charge, but subordinate to the proposed Administration Charge.

46 Pursuant to section 11.51 of the CCAA, the Court has authority to grant a "super priority" charge to the Directors and Officers as security for the indemnity. The factors to be considered on such a request were set out by Pepall J. (as she then was) in *Canwest Global Communications Corp., Re*, [2009] O.J. No. 4286 (Ont. S.C.J. [Commercial List]).

47 Comark has estimated the potential exposure of the Directors and Officers for unpaid statutory amounts, including wages, unremitted source deductions, vacation pay, sales and service taxes, termination pay, employee health tax and unpaid workers' compensation to be approximately (Cdn.) $7.15 million.

48 I accept the submissions of the Applicant and have concluded that the Directors Charge is necessary and appropriate and is granted in the requested amount.

49 The Applicant also requests authorization to make certain pre-filing payments, specifically to critical suppliers.

50 The argument in support of the granting of this request is set out in the Amended Factum at paragraphs 44 - 52. I accept these submissions and concluded that it is appropriate to authorize Comark to make the pre-filing payments. 1 note that the Monitor will be involved in this process and that the consent of the Monitor to make such payments is required.

51 I have also been persuaded that it is appropriate for the Court to exercise its jurisdiction to authorize Comark to pay certain amounts that were donated by Comark's customers to the charitable organizations for which the amounts were intended. This authorization is made notwithstanding that the donated amounts are currently comingled with Comark's other funds.

52 The Applicant also requests approval of the SISP for the reasons set out at paragraphs 54 - 59 of the Amended Factum. I accept these submissions and authorize and approve the SISP.

53 This application was brought without notice to the creditors of Comark, with the exception of Salus. As such, I treat it as an *ex parte* application.

54 The requested relief is granted and the order has been signed to reflect the foregoing.

55 A come-back hearing has been scheduled for April 7, 2015. A further hearing has been scheduled for April 21, 2015.

56 The come-back hearing is to be neutral in all respects.

57 The stay of proceedings is in effect up to and including April 24, 2015, or such later date as the Court may order.

Application granted.

2020 QCCS 3086
Quebec Superior Court

Groupe Dynamite inc. c. Deloitte Restructuring inc.

2020 CarswellQue 10166, 2020 QCCS 3086, 325 A.C.W.S. (3d) 163, EYB 2020-364187

GROUPE DYNAMITE INC., GRG USA HOLDINGS INC. Absentes ET GRG USA LLC (Partie demanderesse) v. DELOITTE RESTRUCTURING INC. (Partie défenderesse)

Kalichman J.C.S.

Judgment: September 18, 2020
Docket: C.S. Montréal 500-11-058763-208

Counsel: Mtre Alain N. Tardif, Mtre Jocelyn T. Perreault, Mtre Miguel Bourbonnais, Mtre Gabriel Faure, Mtre François Alexandre Toupin, Mtre Sarah-Maude Demers, Mtre Pascale Klees-Themens, for Groupe Dynamite Inc., GRG USA Holdings Inc. and GRG USA LLC
Mtre Jean-Yves Simard, Mtre Karine Landry, for Groupe Dynamite Inc., GRG USA Holdings Inc. and GRG USA LLC
Mtre Patrick J. Nash, Mtre AnnElyse Scarlett Gains, for Groupe Dynamite Inc., GRG USA Holdings Inc. and GRG USA LLC
Mtre Luc Morin, Mtre Guillaume Michaud, Mtre Arad Mojtahedi, for the Monitor Deloitte Restructuring Inc.
Mtre Roger P. Simard, Mtre Ari Y. Sorek, Mtre Charlotte Dion, for National Bank of Canada, Bank of Montreal, The Toronto-Dominion Bank and Fédération des Caisses Desjardins du Québec
Mtre François Viau, Mtre Alexandre Forest, for Cadillac Fairview, Oxford Properties, Cominar and Ivanhoé Cambridge
Mtre Michael Citak, for Crombie REIT
Mtre Linda Galessiere, Mtre Jessica Wuthmann, for Cushman & Wakefield Asset Services ULC, Morguard lnvestments Limited and RioCan Real Estate lnvestment Trust
Mtre Michael J. Gardella, Mtre Jennifer D. Raviele, Mtre Robert L. LeHane, Mtre James S. Carr, Mtre Mark Levine, Mtre Julie Bowden, for Brookfield
Mtre Bernard Boucher, Mtre Matthew Millman-Pilon, for Brookfield Properties Retail Inc.
Mtre Daniel Cantin, for Revenu Québec
Mtre Maude Lemay-Brisebois, for Canada Revenue Agency
Pierre Laporte, Jean-François Nadon, Jacob Dube-Dupuis, Marc-Alexandre Cormier, Jean-François Boucher, for Monitor Deloitte Restructuring Inc.

***Kalichman J.C.S.*:**

1 *The Court's decisions on (A) Broookfield's contestation of the Debtors' Application for an Amended and Restated Initial Order; (B) Oxford's representations regarding confidentiality; and (C) the Debtors' Application for an Amended and Restated Initial Order, are attached as a schedule to this procès-verbal.*

2 *SUSPENSION DE L'AUDIENCE*

3 *REPRISE DE L'AUDIENCE*

4 Échange entre le Tribunal et les procureurs

5 *FIN DE L'AUDIENCE*

Annex — TO THE MINUTES OF THE HEARING OF SEPTEMBER 18, 2020

FILE NO 500-11-058763-208

JUDGMENT ON (A) BROOOKFI ELD'S CONTESTATION OF THE DEBTORS' APPLICATI ON FOR AN AMENDED AND RESTATED INITIAL OROER; (B) OXFORD'S REPRESENTATIONS REGARDING CONFIDENTIALITY; AND (C) THE DEBTORS' APPLICATION FOR AN AMENDED AND RESTATED INITIAL OROER

(A) Brookfield's Contestation

[1] Brookfield Properties Retail Inc. (Brookfield) is one of the Debtors' landlords. lt leases approximately 27 stores, all of which are located in the United States.

[2] Brookfield opposes certain of the orders that the Debtors have included in their proposed Amended and Restated Initial Order.

[3] Several of the concerns raised by Brookfield have now been resolved. The remaining issues will be examined in turn by reference to the paragraph in the proposed Order.

Paragraph 53

[53] DECLARES that any payment of Post-Filing Rent made, whether prior to or after this Order, is made without any admission by the Debtors that they are required to pay any amount of Post-Filing Rent and such payment is made under reserve of any right or defense that the Debtors may have under the applicable lease, at law or otherwise not to pay, or to withhold or defer, any amount of Post-Filing Rent.

[4] Brookfield submits that the manner in which this order is drafted will create unnecessary confusion. More specifically, it argues that if a Debtor intends to protest a payment of Post-Filing Rent, it should be required not only to inform the landlord of this prior to or at the time of making its payment but should also be required to indicate the basis for the protest. Accordingly, it asks that this order be removed.

[5] The Court does not agree.

[6] If the Debtors exercise the right to protest a payment of Post-Filing Rent, they should do so in a timely and transparent manner. However, that does not mean that they should be required in all cases to be able to fully explain their position at the time of payment. It is conceivable that such a right might be exercised in a situation that is evolving, in which case a Debtor's right of protest might be compromised merely because it did not have complete information at its disposai.

[7] As far as the landlords are concerned, the Court accepts that they would prefer to know immediately if a payment of Post-Filing Rent were being made under protest. However, from their perspective, the issue is primarily one of convenience and bookkeeping. There is no suggestion that their rights will be compromised.

Paragraph 55

[55] DECLARES that, subject to the terms of this paragraph, where GRG USA LLC cannot operate a store in leased premises as a result of a federal, state or county decree, regulation or order (a "Lockdown Order"), GRG USA LLC does not use such leased premises from the time such Lockdown Order enters into force until the time such Lockdown Order is no longer in force (the "Lockdown Period") such that no Post-Filing Rent shall be due or payable by GRG USA LLC with respect to those leased premises for the Lockdown Period. This paragraph only applies in respect of Post-Filing Rent payable for leased premises located in the following locations:

(a) Canoga Park, California, USA;

(b) Torrance, California, USA;

(c) Cerritos, California, USA; and

(d) Glendale, California, USA.

[8] Brookfield argues that the order set out in paragraph 55 would amount to the Court "solely and specifically targeting" relationships between foreign entities, which it does not have the jurisdiction to do. According to Brookfield, only a U.S. court can issue an order such as the one sought here.

[9] Brookfield adds that if the Court does have jurisdiction to issue such an order, it should refuse to exercise it since the order sought takes no account of the terms of the leases or the applicable law.

[10] With respect to the issue of jurisdiction, the Court disagrees with Brookfield. If the Court were to follow this argument, it would have jurisdiction to render a general order that impacted landlords on both sides of the border but not a specific order targeting only certain landlords that happen to be located in the U.S. Brookfield provided no support for this distinction and the Court is not swayed by its arguments.

[11] With respect to the issue of whether or not the Debtors should be required to pay Post-Filing Rent, the Court recognizes that under the applicable leases, which have not been filed into evidence, the parties may have agreed to language that would require the Debtor to pay rent even if it does not have peaceable enjoyment of the leased premises. In this sense, it is conceivable that under the terms of those leases, rent may still be owing.

[12] However, the issue before the Court is narrower than that. Based on s. 11.01 (a) of the CCAA, the question is whether or not the Debtor can be required to make immediate payment for the "use of leased...property".

[13] The evidence discloses that the four leased premises at issue are all located in shopping malls that are shuttered as a result of government decrees. Consequently, the Debtors have no access to the premises during the lockdown period.

[14] Given the policy objectives of the CCAA and given that exceptions to a stay order are to be narrowly interpreted, the Court agrees that the Debtors are not currently using these particular leased premises. However, this determination is made for a relatively brief period and nothing precludes Brookfield or any of the other landlords at issue, from contesting a request for renewal and from bringing evidence that is not currently before the Court.

The Sale Guidelines

[15] Brookfield argues that the Debtors are seeking to impose guidelines that would govern the "going-out-of-business" sales to take place in locations that are to be closed, without having given Brookfield a meaningful opportunity to negotiate its terms. Even though Brookfield recognizes that the guidelines are the same or similar to those that have been used in other CCAA proceedings, it argues that it is premature for the Court to impose such guidelines under the circumstances.

[16] If the guidelines are imposed, Brookfield asks that the two days' written notice to schedule a "status hearing" be extended to account for delays in cross-border communications.

[17] The Court disagrees.

[18] The Debtors have already sent 78 notices to disclaim leases so it is imperative that guidelines be put in place. The Debtors' request is not premature.

[19] The guidelines do incorporate a degree of flexibility. Nothing precludes Brookfield from raising specific concerns with the Debtors and from possibly agreeing to modify the guidelines. Furthermore, if a dispute does arise concerning the conduct of the sale, either party can initiate a dispute settlement process and schedule a "status hearing" before the Court within a very short delay.

[20] Finally, as regards the scheduling of the status hearing, the Court does not agree that two days is too short. The Court can appreciate the complexities involved in responding on such short notice but since the sales will be ongoing, it is imperative that any dispute be resolved in the quickest possible delay.

(B) Confidentiality

[21] While they do not contest the sealing order sought by the Debtors, several landlords, including Oxford Properties, Cadillac Fairview, Cominar and Ivanhoé Cambridge (collectively *Oxford*), object to the Debtors' refusal to communicate the confidential information to them upon signature of a non-disclosure agreement. Their arguments are supported by three other landlords, namely: Cushman & Wakefield Asset Services ULC, Morguard lnvestments Limited and RioCan Real Estate Investment Trust.

[22] The order that the Debtors seek in regards to confidentiality, reads as follows:

[84] ORDERS that Exhibit P-2, Appendices B, C and D to Exhibit P-6, and the Appendices to the Second Report of the Monitor dated September 16, 2020 in support of the Application are confidential and are filed under seal, and PRAYS ACT of the Debtors' undertaking to communicate any of those exhibits to certain creditors following an undertaking of confidentiality.

[23] Even though the order is not contested *per se*, the Court must still be satisfied that that such an order should be issued. ln this regard, it is the Debtors' burden to establish that:

- That the sealing order is necessary to prevent a real and substantial serious risk to an important commercial interest. The risk must be well-grounded in the evidence and pose a serious threat to the commercial interest in question;

- There must be no other reasonable alternative to the sealing order and the order, if granted, must be restricted as muchas reasonably possible; and

- The salutary effects of the sealing order must outweigh its deleterious effects including its effect on the open-court principle. [1]

[24] The information that the Debtors wish to keep confidential, can be divided into two groups:

- The list of landlords who have been sent notices of disclaimer (Schedule A to the Monitor's Second Report);

- The schedule of amounts paid to critical suppliers and the weekly cash flow statements (Schedules B, C and D to Monitor's First Report and Schedules C and D to the Monitor's Second Report).

[25] With respect to the list of disclaimed leases, the Debtors argue that if it were to be made public or, at the very least, shared amongst the landlords, it would reduce the Debtors' leverage in their ongoing negotiations with the landlords.

[26] The Debtors argue that they should be able to conduct these negotiations on a one-on-one basis. If the list of disclaimed leases were to be shared, they fear that the landlords would raise issues and arguments that might hamper the negotiations.

[27] The Court is not convinced that the disclosure of the list of disclaimed leases would cause a real and substantial serious risk to an important commercial interest.

[28] First, it is not clear how the list could be used to the Debtors' detriment. lt is conceivable that a landlord armed with this information may feel that its leases have been disproportionately targeted but the Court does not agree that this diminishes the leverage the Debtors may have in their negotiations.

[29] Second, the mere fact that keeping this information out of the hands of the landlords might give the Debtors an advantage in their negotiations, does not constitute an important commercial interest. In this regard, it must be emphasized that in order to qualify as an "important commercial interest", the interest in question:

> cannot merely be specific to the party requesting the order; the interest must be one which can be expressed in terms of a public interest in confidentiality. For example, a private company could not argue simply that the existence of a particular contract should not be made public because to do so would cause the company to lose business, thus harming its commercial interests. [2]

[30] Based on the evidence before the Court, the concern over disclosure cannot be expressed in terms of a public interest. At best, it is particular to the Debtors.

[31] Furthermore, it is worth noting that there is nothing preventing landlords who have received disclaimer notices from sharing that information. The sealing order would not prevent this from happening; it would merely make it more difficult.

[32] In regards to the list of disclaimed leases, the Court is not satisfied that it should derogate from the general rule of publicity and public access to all evidentiary material in CCAA proceedings. Accordingly, Appendix A to the Monitor's Second Report will not be sealed.

[33] With respect to the other aspects of the requested sealing order, primarily the Debtors' cash flow statements, the Court is satisfied, at this early stage in the process, that the concerns expressed in the Application (paragraphs 106-110) and the testimony of Mr. Petraglia (COQ and lnterim CFO), although they are somewhat general in nature, are sufficient, to warrant a ban on publication as contemplated in s. 10(3) of the CCAA.

[34] However, the Court does not agree with the Debtors that this information should be kept from landlords who are prepared to sign an undertaking of confidentiality.

[35] Parties seeking a sealing order, in this case, the Debtors, bear the burden of establishing that the order is necessary. [3] The parties objecting to such an order, in this case, the landlords, are not required to prove that the information they seek access to is necessary or even helpful to them at this stage.

[36] Based on the evidence before the Court, the only potential risk to the Debtors' commercial interests would be from competitors. Since there is nothing in the evidence to suggest that any of the landlords, including those making representations on this issue, are competitors of the Debtors, the Court considers that an undertaking of confidentiality is appropriate and will therefore direct the Debtors to communicate the sealed exhibits to any of its landlords upon signature of an undertaking of confidentiality.

[37] Since the Court is not aware which of the Debtors' creditors might also be competitors, its direction, at this point intime, will be limited to landlords.

(C) The Debtors' Application for an Amended and Restated Initial Order

[38] Subject to the modification in regards to paragraph 84 of the proposed Amended and Restated Initial Order, the Debtors' Application for an Amended and Restated Initial Order will be granted.

FOR THESE REASONS, THE COURT:

[39] *DISMISSES* Brookfield's Contestation of the Debtors' Application for Amended and Restated Initial Order;

[40] *DIRECTS* the Debtors to communicate the exhibits sealed by virtue of the Amended and Restated Initial Order signed this day, to any of its landlords upon signature of an undertaking of confidentiality; and

[41] Subject to modification to paragraph 84 of the draft order *GRANTS* the Debtors' Application for Amended and Restated Initial Order as per the order signed this day;

Graphic 1

SUPERIOR COURT (COMMERCIAL DIVISION)

Canada

Province of Québec

District of Montréal

No: 500-11-058763-208

Date: September 17, 2020

Presiding: The Honourable Peter Kalichman, J.S.C.

In the matter of the *Companies' Creditors Arrangement Act*, ASC 1985, c C-36 of: *Groupe Dynamite Inc. GRG USA Holdings Inc. GRG USA LLC* Debtors and *Deloitte Restructuring Inc.* Monitor

AMENDED AND RESTATED INITIAL OROER

[1] CONSIDEAING the *Application for an Initial Order and an Amended and Restated Initial Order* dated September 8, 2020 (the *"Application")* of Groupe Dynamite Inc., GAG USA Holdings Inc. and GAG USA LLC (collectively, the *"Debtors")* pursuant to the *Companies' Creditors Arrangement Act*, ASC 1985, c C-36 (the *"CCAA")*, the affidavit, and the exhibits, including the report of the Monitor;

[2] CONSIDEAING the notification of the Application;

[3] CONSIDEAING the representations of the lawyers present;

[4] CONSIDEAING the provisions of the CCAA;

THE COURT:

[5] GRANTS the Application.

[6] ISSUES an order pursuant to the CCAA (the *"Order")*, divided under the following headings:

- Service
- Application of the CCAA
- Effective Time
- Plan of Arrangement
- Administrative Consolidation
- Stay of Proceedings against the Debtors and the Property
- Stay of Proceedings against the Directors and Officers
- Possession of Property and Operations

- No Exercise of Rights or Remedies
- No Interference with Rights
- Continuation of Services
- Non-Derogation of Rights
- Interim Financing
- Directors' and Officers' Indemnification and Charge
- Restructuring
- Powers of the Monitor
- Specific Measures with Respect to the Leases
- Gift Cards and Loyalty Programs
- Priorities and General Provisions Relating to CCAA Charges
- Hearing scheduling and details
- General

Service

[7] ORDERS that any prior delay for the presentation of the Application is hereby abridged and validated so that the Application is properly returnable today and hereby dispenses with further service thereof.

[8] DECLARES that sufficient prior notice of the presentation of this Application has been given by the Debtors to interested parties, including the secured creditors which are likely to be affected by the charges created herein.

Application of the CCAA

[9] DECLARES that the Debtors are debtor companies to which the CCAA applies.

Effective Time

[10] DECLARES that this Orcier and all of its provisions are effective as of 12:01 a.m. Montréal time, province of Québec, on September 8, 2020, or, where applicable, on the date of this Orcier (the *"Effective Time")*.

Plan of Arrangement

[11] DECLARES that the Debtors shall have the authority to file with this Court and to submit to their creditors one or more plans of compromise or arrangement (collectively, the *"Plan")* in accordance with the CCAA.

Administrative Consolidation

[12] ORDERS the consolidation of the CCAA proceedings of the Debtors under one single Court file, in file number 500-11-058763-208.

[13] ORDERS that ail proceedings, filings, and other matters in the CCAA proceedings be filed jointly and together by the Debtors under file number 500-11-058763-208.

[14] DECLARES that the consolidation of these CCAA proceedings in respect of the Debtors shall be for administrative purposes only and shall not effect a consolidation of the assets and property or of the debts and obligations of each of the Debtors including, without limitation, for the purposes of any Plan or Plans that may be hereafter proposed.

Stay of Proceedings against the Debtors and the Property

[15] ORDERS that, until and including October 19, 2020, or such later date as the Court may order (the *"Stay Period")*, no proceeding or enforcement process in any court or tribunal (each, a *"Proceeding")*, including but not limited to seizures, right to distrain, executions, writs of seizure or execution, any and ail actions, applications, arbitration proceedings and other lawsuits existing at the time of this Order in which any of the Debtors is a defendant, party or respondent (either individually or with other Persans (as defined below)) shall be commenced or continued against or in respect of the Debtors, or affecting the Debtors' business operations and activities (the *"Business")* or the Property (as defined herein below), including as provided in paragraph [23] herein except with leave of this Court. Any and ail Proceedings currently under way against or in respect of the Debtors or affecting the Business or the Property are hereby stayed and suspended pending further order of this Court, the whole subject to section 11.1 CCAA.

[16] ORDERS that the rights of Her Majesty in right of Canada and Her Majesty in right of a Province are suspended in accordance with the terms and conditions of section 11.09 CCAA.

Stay of Proceedings against Directors and Officers

[17] ORDERS that during the Stay Period and except as permitted under subsection 11.03(2) of the CCAA, no Proceeding may be commenced, or continued against any former, present or future director or officer of the Debtors nor against any persan deemed to be a director or an officer of any of the Debtors under subsection 11.03(3) of the CCAA (each, a *"Director"*, and collectively the *"Directors")* in respect of any claim against such Director which arase prior to the Effective Time and which relates to any obligation of the Debtors where it is alleged that any of the Directors is under any law liable in such capacity for the payment of such obligation.

Possession of Property and Operations

[18] ORDERS that, subject to this Order, the Debtors shall remarn rn possession and contrai of their present and future assets, rights, undertakings and properties of every nature and kind whatsoever, and wherever situated, including ail proceeds thereof and ail bank accounts (collectively the *"Property")* notwithstanding any enforcement process, including but not limited to seizures, right to distrain, executions, writs of seizure or execution, the whole in accordance with the terms and conditions of this Order.

[19] ORDERS that, subject to this Orcier, each of the Debtors are authorized to complete outstanding transactions and engage in new transactions with other Debtors, and to continue, on and after the date of this Orcier, to buy and sell goods and services, and allocate, collect and pay costs, expenses and other amounts from and to the other Debtors, or any of them (collectively, the *"Intercompany Transactions")* in the ordinary course of business. Ali ordinary course Intercompany Transactions among the Debtors shall continue on terms consistent with existing arrangements or past practice, subject to such changes thereto, or to such governing principles, policies or procedures as the Monitor may require, or subject to this Orcier or further Orcier of this Court.

[20] ORDERS that the Debtors shall be entitled to continue to utilize the central cash management system currently in place as described in the Application (the *"Cash Management System").*

[21] ORDERS that the Debtors shall be entitled but not required to pay the following expenses whether incurred prior to or after this Orcier:

> (a) all outstanding and future wages, salaries, bonuses, expenses, benefits and vacation pay payable on or after the date of this Orcier, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements;

(b) the fees and disbursements of any agent, advisor or counsel retained or employed by the Debtors or by the Agent on behalf of the Secured Lenders in respect of these proceedings, at their standard rates and charges; and

(c) with the consent of the Monitor, and only after the Interim Facility has been advanced to the Debtors for an amount of $10,000,000, amounts owing for goods or services actually supplied to the Debtors prior to the date of this Orcier by third party suppliers up to a maximum aggregate amount of $5,000,000, if, in the opinion of the Debtors, the supplier is critical to the business and ongoing operations of the Debtors.

[22] ORDERS that the Debtors shall remit, in accordance with legal requirements, or pay:

(a) any statutory deemed trust amounts in faveur of the Crown in right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from employees' wages, including, without limitation, amounts in respect of (i) employment insurance, (ii) Canada Pension Plan, (iii) Québec Pension Plan, and (iv) incarne taxes; and

(b) all goods and services, harmonized sales or other applicable sales taxes (collectively, *"Sales Taxes")* required to be remitted by the Debtors and in connection with the sale of goods and services by the Debtors, but only where such Sales Taxes are accrued or collected after the date of this Orcier, or where such Sales Taxes were accrued or collected prior to the date of this Orcier but not required to be remitted until on or after the date of this Order.

No Exercise of Rights or Remedies

[23] ORDERS that during the Stay Period, and subject to, *inter alia*, subsection 11.1 CCAA, all rights and remedies, including, but not limited to modifications of existing rights and events deemed to occur pursuant ta any agreement to which any of the Debtors is a party as a result of the insolvency of the Debtors and/or these CCAA proceedings, any events of default or non-performance by the Debtors or any admissions or evidence in these CCAA proceedings, of any individual, natural persan, firm, corporation, partnership, limited liability company, trust, joint venture, association, organization, governmental body or agency, or any other entity (all of the foregoing, collectively being *"Persons"* and each being a *"Person")* against or in respect of the Debtors, or affecting the Business, the Property or any part thereof, are hereby stayed and suspended except with leave of this Court.

[24] DECLARES that, to the extent any rights, obligations, or prescription, time or limitation periods, including, without limitation, to file grievances, relating ta the Debtors or any of the Property or the Business may expire (other than pursuant to the terms of any contracts, agreements or arrangements of any nature whatsoever), the term of such rights, obligations, or prescription, time or limitation periods shall hereby be deemed to be extended by a period equal to the Stay Period. Without limitation ta the foregoing, in the event that the Debtors, or any of them, become(s) bankrupt or a receiver as defined in subsection 243(2) of the *Bankruptcy and Insolvency Act* (Canada) (the *"BIA")* is appointed in respect of any of the Debtors, the period between the date of this Orcier and the day on which the Stay Period ends shall not be calculated in respect of the Debtors in determining the 30 day periods referred ta in Sections 81.1 and 81.2 of the BIA.

No Interference with Rights

[25] ORDERS that during the Stay Period, no Persan shall discontinue, fail to renew per the same terms and conditions, honour, alter, interfere with, repudiate, resiliate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Debtors, except with the written consent of the Debtors, as applicable, and the Monitor, or with leave of this Court.

Continuation of Services

[26] ORDERS that during the Stay Period and subject to paragraph [28] hereof and subsection 11.01 CCAA, all Persans having verbal or written agreements with the Debtors or statutory or regulatory mandates for the supply of goods or services, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation, utility or other goods or services made available to the Debtors, are hereby restrained until further

order of this Court from discontinuing, failing ta renew per the same terms and conditions, altering, interfering with, terminating the supply or, where the case may be, interrupting, delaying or stopping the transit of such goods or services as may be required by the Debtors, and that the Debtors shall be entitled to the continued use of their current premises, telephone numbers, facsimile numbers, internet addresses, domain names or other services, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Debtors, without having ta provide any security deposit or any other security, in accordance with normal payment practices of the Debtors or such other practices as may be agreed upon by the supplier or service provider and the Debtors, as applicable, with the consent of the Monitor, or as may be ordered by this Court.

[27] ORDERS that, subject ta subsection 11.01 CCAA and paragraph [55] hereof, no Persan shall be prohibited from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided ta the Debtors on or after the date of this Order, nor shall any Persan be under any obligation on or after the date of this Order ta make further advance of money or otherwise extend any credit ta the Debtors.

[28] ORDERS that, without limiting the generality of the foregoing and subject ta Section 21 of the CCAA, if applicable, and the following paragraphs, cash or cash equivalents placed on deposit by any Debtor with any Persan during the Stay Period, whether in an operating account or otherwise for itself or for another entity, shall not be applied by such Persan in reduction or repayment of amounts owing ta such Persan or in satisfaction of any interest or charges accruing in respect thereof; however, this provision shall not prevent any financial institution from: (i) reimbursing itself for the amount of any cheques drawn by an Debtor and properly honoured by such institution, or (ii) holding the amount of any cheques or other instruments deposited into an Debtor's account until those cheques or other instruments have been honoured by the financial institution on which they have been drawn.

[28A] PRAYS ACT of the consent of each of the Secured Lenders ta suspend, until October 19, 2020, and without prejudice or waiver of such right, and subject ta the Interim Facility being advanced to the Debtors for an amount of $10,000,000, its right ta effect set-off between:

(a) the amount of $13,205,000 cash in the Secured Lenders' bank accounts (the *"Cash in the Bank Accounts");* and

(b) the Secured Lenders' total advances ta the Debtors.

[288] ORDERS that the Cash in the Bank Accounts shall be maintained and kept in a segregated account until October 19, 2020, unless otherwise agreed between the Agent and the Debtors.

[28C] ORDERS the Debtors ta pay ta each of the Secured Lenders, when due, all amounts owing (including principal, interest, fees and expenses), including without limitation, all reasonable fees and disbursements of counsel and all other reasonably required advisers ta or agents of the Secured Lenders on a full indemnity basis under the loan documents and to perform all of their other obligations ta the Secured Lenders pursuant ta the loan documents and this Order.

Non-Derogation of Rights

[29] ORDERS that, notwithstanding the foregoing, any Person who provided any kind of letter of credit, guarantee or bond (the *"lssuing Party")* at the request of any of the Debtors shall be required to continue honouring any and all such letters, guarantees and bonds, issued on or before the date of this Orcier, provided that all conditions under such letters, guarantees and bonds are met save and except for defaults resulting from this Orcier; however, the lssuing Party shall be entitled, where applicable, to retain the bills of lading or shipping or other documents relating thereto until paid.

Interim Financing

[30] ORDERS that the Debtors are authorized to borrow, repay and reborrow from 10644579 Canada Inc. (the *"Interim Lender")* such amounts from time to time as they may consider necessary or desirable, up to a maximum principal amount of $20,000,000 outstanding at any time, on the terms and conditions as set forth in the Amended Interim Financing Term Sheet, Exhibit P-1O

(the *"Interim Financing Term Sheet")* and in the Interim Financing Documents (as defined hereinafter), to fund the ongoing expenditures of the Debtors and to pay such other amounts as are permitted by the terms of this Orcier and the Interim Financing Documents (as defined hereinafter) (the *"Interim Facility").*

[31] ORDERS that the Debtors are authorized to execute and deliver such credit agreements, security documents and other definitive documents (collectively the *"Interim Financing Documents")* as may be required by the Interim Lender in connection with the Interim Facility and the Interim Financing Term Sheet, and the Debtors are authorized to perform all of its obligations under the Interim Financing Documents.

[32] ORDERS that the Debtors shall pay to the Interim Lender, when due, all amounts owing (including principal, interest, fees and expenses, including without limitation, all reasonable fees and disbursements of counsel and all other reasonably required advisers to or agents of the Interim Lender on a full indemnity basis (the *"Interim Lender Expenses"))* under the Interim Financing Documents and shall perform all of its other obligations to the Interim Lender pursuant to the Interim Financing Term Sheet, the Interim Financing Documents and this Orcier.

[33] DECLARES that all of the Property of the Debtors is subject to a charge, hypothec and security for an aggregate amount of $24,000,000 (the *"Interim Lender Charge")* in favour of the Interim Lender as security for all obligations of the Debtors to the Interim Lender with respect to all amounts owing (including principal, interest and the Interim Lender Expenses) under or in connection with the Interim Financing Term Sheet and the Interim Financing Documents. The Interim Lender Charge shall have the priority established by paragraphs [62] to [63] of this Orcier.

[34] ORDERS that the claims of the Interim Lender pursuant to the Interim Financing Documents shall not be compromised or arranged pursuant to the Plan or these proceedings and the Interim Lender, in that capacity, shall be treated as an unaffected creditor in these proceedings and in any Plan.

[35] ORDERS that the Interim Lender may:

(a) notwithstanding any other provision of this Orcier, take such steps from time to time as it may deem necessary or appropriate to register, record or perfect the Interim Lender Charge and the Interim Financing Documents in all jurisdictions where it deems it is appropriate; and

(b) notwithstanding the terms of the paragraph to follow, refuse to make any advance to the Debtors if they fail to meet the provisions of the Interim Financing Term Sheet and the Interim Financing Documents.

[36] ORDERS that the Interim Lender shall not take any enforcement steps under the Interim Financing Documents or the Interim Lender Charge without providing at least 5 business days written notice (the *"Notice Period")* of a default thereunder to the Debtors, the Monitor, the Agent and to creditors whose rights are registered or published at the appropriate registers or requesting a copy of such notice. Upon expiry of such Notice Period, the Interim Lender shall be entitled to take any and all steps under the Interim Financing Documents and the Interim Lender Charge and otherwise permitted at law, but without having to send any demands under Section 244 of the BIA and upon the Interim Lender taking such steps, the Agent and the Secured Lenders shall be entitled to take any and all steps under the loan documents and otherwise permitted at law, but without having to send any demands under Section 244 of the BIA.

[37] ORDERS that, subject to further order of this court, no order shall be made varying, rescinding, or otherwise affecting paragraphs [30] to [36] hereof unless either (a) notice of a motion for such order is served on the interim lender by the moving party within seven (7) days after that party was served with the order or (b) the Interim Lender applies for or consents to such order.

Directors' and Officers' Indemnification and Charge

[38] ORDERS that the Debtors shall indemnify their Directors from all claims relating to any obligations or liabilities they may incur and which have accrued by reason of or in relation to their respective capacities as directors or officers of the Debtors after

the Effective Time, except where such obligations or liabilities were incurred as a result of such Director's gross negligence, willful misconduct or gross or intentional fault as further detailed in Section 11.51 CCAA.

[39] ORDERS that the Directors of the Debtors shall be entitled to the benefit of and are hereby granted a charge, security and hypothec in the Property to the extent of the aggregate amount of $6,950,000 (the *"Directors' Charge")*, as security for the indemnity provided in paragraph [38] hereof as it relates to obligations and liabilities that the Directors may incur in such capacity after the Effective Time, having the priority established by paragraphs [62] and [63] of this Orcier.

[40] ORDERS that, notwithstanding any language in any applicable insurance policy to the contrary, (a) no insurer shall be entitled to be subrogated to or claim the benefit of the Directors' Charge, and (b) the Directors shall only be entitled to the benefit of the Directors' Charge to the extent that they do not have coverage under any directors' and officers' insurance policy, or to the extent that such coverage is insufficient to pay amounts for which the Directors are entitled to be indemnified in accordance with paragraph [38) of this Order.

Restructuring

[41] DECLARES that, to facilitate the orderly restructuring of their business and financial affairs (the *"Restructuring")* but subject to such requirements as are imposed by the CCAA, the Debtors shall have the right, subject to approval of the Monitor or further order of the Court, to:

(a) permanently or temporarily cease, downsize or shut down any of their operations or locations as they deem appropriate and make provision for the consequences thereof in the Plan;

(b) pursue all avenues to finance or refinance, market, convey, transfer, assign or in any other manner dispose of the Business or Property, in whole or part, subject to further order of the Court and sections 11.3 and 36 CCAA, and under reserve of subparagraph (c);

(c) convey, transfer, assign, lease, or in any other manner dispose of the Property, outside the ordinary course of business, in whole or in part, provided that the price in each case does not exceed $250,000 or $1,000,000 in the aggregate;

(d) terminate the employment of such of their employees or temporarily or permanently lay off such of their employees as they deem appropriate and, to the extent any amounts in lieu of notice, termination or severance pay or other amounts in respect thereof are not paid in the ordinary course, make provision, on such terms as may be agreed upon between the Debtors, as applicable, and such employee, or failing such agreement, make provision to deal with, any consequences thereof in the Plan, as the Debtors may determine;

(e) disclaim or resiliate agreements, subject to the provisions of section 32 CCAA which are as follows:

32 (1) Subject to subsections (2) and (3), a debtor company may — on notice given in the prescribed form and manner to the other parties to the agreement and the monitor-disclaim or resiliate any agreement to which the company is a party on the day on which proceedings commence under this Act. The company may not give notice unless the monitor approves the proposed disclaimer or resiliation.

(2) Within 15 days after the day on which the company gives notice under subsection (1), a party to the agreement may, on notice to the other parties to the agreement and the monitor, apply to a court for an order that the agreement is not to be disclaimed or resiliated.

(3) If the monitor does not approve the proposed disclaimer or resiliation, the company may, on notice to the other parties to the agreement and the monitor, apply to a court for an order that the agreement be disclaimed or resiliated.

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

(a) whether the monitor approved the proposed disclaimer or resiliation;

(b) whether the disclaimer or resiliation would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and

(c) whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.

(5) An agreement is disclaimed or resiliated

(a) if no application is made under subsection (2), on the day that is 30 days after the day on which the company gives notice under subsection (1);

(b) if the court dismisses the application made under subsection (2), on the day that is 30 days after the day on which the company gives notice under subsection (1) or on any later day fixed by the court; or

(c) if the court orders that the agreement is disclaimed or resiliated under subsection (3), on the day that is 30 days after the day on which the company gives notice or on any later day fixed by the court.

(6) If the company has granted a right to use intellectual property to a party to an agreement, the disclaimer or resiliation does not affect the party's right to use the intellectual property — including the party's right to enforce an exclusive use — during the term of the agreement, including any period for which the party extends the agreement as of right, as long as the party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

(7) If an agreement is disclaimed or resiliated, a party to the agreement who suffers a loss in relation to the disclaimer or resiliation is considered to have a provable claim.

(8) A company shall, on request by a party to the agreement, provide in writing the reasons for the proposed disclaimer or resiliation within five days after the day on which the party requests them.

(9) This section does not apply in respect of

(a) an eligible financial contract;

(b) a collective agreement;

(c) a financing agreement if the company is the borrower; or

(d) a lease of real property or of an immovable if the company is the lessor. and

(f) subject to section 11.3 CCAA, assign any rights and obligations of Debtors.

[42] DECLARES that, if a notice of disclaimer or resiliation is given to a landlord of any of the Debtors pursuant to section 32 of the CCAA and subsection [41](e) of this Orcier, then (a) during the notice period prior to the effective time of the disclaimer or resiliation, the landlord may show the affected leased premises to prospective tenants during normal business hours by giving such Debtor and the Monitor 24 hours' prior written notice and (b) at the effective time of the disclaimer or resiliation, the landlord shall be entitled to take possession of any such leased premises and re-lease any such leased premises to third parties on such terms as any such landlord may determine without waiver of, or prejudice to, any claims or rights of the landlord against the Debtors, provided nothing herein shall relieve such landlord of their obligation to mitigate any damages claimed in connection therewith.

[43] DECLARES that, in order to facilitate the Restructuring, the Debtors may, subject to the approval of the Monitor, or further order of the Court, settle daims of customers and suppliers that are in dispute.

[44] DECLARES that, pursuant to sub-paragraph 7(3)(c) of the Personal Information Protection and Electronic Documents Act, SC 2000, c 5, the Debtors are permitted, in the course of these proceedings, to disclose personal information of identifiable individuals in their possession or contrai to stakeholders or prospective investors, financiers, buyers or strateg ic partners and to their advisers (individually, a *"Third Party")*, but only to the extent desirable or required to negotiate and complete the Restructuring or the preparation and implementation of the Plan or a transaction for that purpose, provided that the Persans to whom such personal information is disclosed enter into confidentiality agreements with the Debtors binding them to maintain and protect the privacy of such information and to limit the use of such information to the extent necessary to complete the transaction or Restructuring then under negotiation. Upon the completion of the use of personal information for the limited purpose set out herein, the personal information shall be returned to the Debtors or destroyed. In the event that a Third Party acquires personal information as part of the Restructuring or the preparation or implementation of the Plan or a transaction in furtherance thereof, such Third Party may continue to use the personal information in a manner which is in all respects identical to the prior use thereof by the Debtors.

Powers of the Monitor

[45] ORDERS that Deloitte Restructuring Inc. is hereby appointed to monitor the business and financial affairs of the Debtors as an officer of this Court (the *"Monitor")* and that the Monitor, in addition to the prescribed powers and obligations, referred to in Section 23 of the CCAA:

(a) shall, as soon as practicable, (i) publish once a week for two (2) consecutive weeks or as otherwise directed by the Court, in La Presse+ and the Globe & Mail National Edition and (ii) within five (5) business days after the date of this Orcier (A) post on the Monitor's website (the *"Website")* a notice containing the information prescribed under the CCAA, (8) make this Orcier publicly available in the manner prescribed under the CCAA, (C) send, in the prescribed manner, a notice to all known creditors having a claim against the Debtors of more than $1,000, advising them that this Orcier is publicly available, and (D) prepare a list showing the names and addresses of such creditors and the estimated amounts of their respective claims, and make it publicly available in the prescribed manner, all in accordance with Section 23(1)(a) of the CCAA and the regulations made thereunder;

(b) shall monitor the Debtors' receipts and disbursements;

(c) shall assist the Debtors, to the extent required by the Debtors, in dealing with their creditors and other interested Persons during the Stay Period;

(d) notwithstanding subparagraphs (a) to (c) above, with respect to any real property or immovable leased premises, the Debtors may, subject to the requirement of the CCAA, vacate, abandon or quit the whole, but not part of any leased premises and may permanently, but not temporally ceases, downsize or shut down its operations in such leased premises;

(e) shall assist the Debtors, to the extent required by the Debtors, with the preparation of their cash flow projections and any other projections or reports and the development, negotiation and implementation of the Plan;

(f) shall advise and assist the Debtors, to the extent required by the Debtors, to review the Debtors' business and assess opportunities for cost reduction, revenue enhancement and operating efficiencies;

(g) shall assist the Debtors, to the extent required by the Debtors, with the Restructuring and in their negotiations with their creditors and other interested Persons and with the holding and administering of any meetings held to consider the Plan;

(h) shall report to the Court on the state of the business and financial affairs of the Debtors or developments in these proceedings or any related proceedings within the time limits set forth in the CCAA and at such time as considered appropriate by the Monitor or as the Court may order and may file consolidated reports for the Debtors;

(i) shall report to this Court and interested parties, including but not limited to creditors affected by the Plan, with respect to the Monitor's assessment of, and recommendations with respect to, the Plan;

(j) may retain and employ such agents, advisers and other assistants as are reasonably necessary for the purpose of carrying out the terms of this Order, including, without limitation, one or more entities related to or affiliated with the Monitor;

(k) may engage legal counsel to the extent the Monitor considers necessary in connection with the exercise of its powers or the discharge of its obligations in these proceedings and any related proceeding, under this Orcier or under the CCAA;

(l) may act as a "foreign representative" of any of the Debtors or in any other similar capacity in any insolvency, bankruptcy or reorganisation proceedings outside of Canada or the United States;

(m) may hold and administer funds in connection with arrangements made among the Debtors, any counterparties and the Monitor, or by Orcier of this Court; and

(n) may perform such other duties as are required by this Orcier or the CCAA or by this Court from time to time.

Unless expressly author ized to do so by this Court, the Monitor shall not otherwise interfere with the business and financial affairs carried on by the Debtors, and the Monitor is not empowered to take possession of the Property nor to manage any of the business and financial affairs of the Debtors nor shall the Monitor be deemed to have done so.

[46] ORDERS that the Debtors and their Directors, officers, employees and agents, accountants, auditors and all other Persans having notice of this Orcier shall forthwith provide the Monitor with unrestricted access to all of the Business and Property, including, without limitation, the premises, books, records, data, including data in electronic form, and all other documents of the Debtors in connection with the Monitor's duties and responsibilities hereunder.

[47] DECLARES that the Monitor may provide creditors and other relevant stakeholders of the Debtors with information in response to requests made by them in writing addressed to the Monitor and copied to the counsel for the Debtors. In the case of information that the Monitor has been advised by the Debtors is confidential, proprietary or competitive, the Monitor shall not provide such information to any Persan without the consent of the Debtors unless otherwise directed by this Court.

[48] DECLARES that if the Monitor, in its capacity as Monitor, carries on the business of the Debtors or continues the employment of the Debtors' employees, the Monitor shall benefit from the provisions of section 11.8 of the CCAA.

[49] DECLARES that no action or other proceedings shall be commenced against the Monitor relating to its appointment, its conduct as Monitor or the carrying out of the provisions of any order of this Court, except with prior leave of this Court, on at least seven days' notice to the Monitor and its counsel. The entities related to or affiliated with the Monitor shall also be entitled to the protection, benefits and privileges afforded to the Monitor pursuant to this paragraph.

[50] ORDERS that the Debtors shall pay the reasonable tees and disbursements of the Monitor, the Monitor's legal counsel, the legal counsel for the Debtors and other advisers, directly related to these proceedings, the Plan and the Restructuring, whether incurred before or after this Order, and shall be authorized to provide each with a reasonable retainer in advance on account of such tees and disbursements, if so requested.

[51] DECLARES that the Monitor as well as the Monitor's legal counsel (Norton Rose Fulbright Canada LLP) and the legal counsel for the Debtors (McCarthy Tétrault LLP), as security for the professional tees and disbursements incurred both before and after the making of this Order and directly related to these proceedings, the Plan and the Restructuring, be entitled to the benefit of and are hereby granted a charge, hypothec and security in the Property to the extent of the aggregate amount of $750,000 (the *"Administration Charge")*, having the priority established by paragraphs [62] and [63] of this Order.

Specific Measures with Respect to the Leases

[52] ORDERS that, for the use of each leased premises, the Debtors shall pay ail amounts constituting rent or payable as rent under real property or immovable leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable to the landlord under its lease, but for greater certainty, excluding accelerated rent or

penalties, tees, interests or other charges arising as a result of the insolvency of the Debtors or the making of this Order) or as otherwise may be negotiated between the Debtors and the landlord from time to time *("Post-Filing Rent")*, for the period commencing on the Effective Time, twice-monthly in equal payments on the first and fifteenth day of each month, or the immediately following business day if that day is not a business day, in advance (but not in arrears). On the date of the first of such payments, any Post-Filing Rent relating to the period from the Effective Time to such date shall also be paid.

[53] DECLARES that any payment of Post-Filing Rent made, whether prior to or after this Order, is made without any admission by the Debtors that they are required to pay any amount of Post-Filing Rent and such payment is made under reserve of any right or defense that the Debtors may have under the applicable lease, at law or otherwise not to pay, or to withhold or defer, any amount of Post-Filing Rent.

[54] ORDERS that in the event the Debtors disclaim or resiliate the lease in respect of any leased premises in accordance with the CCAA, the Debtors shall not be required to pay Post-Filing Rent under such lease pending resolution of any dispute concerning furnishings, fixtures, equipment or a combination thereof located in the premises under lease (other than Post-Filing Rent payable for the notice period provided for in Section 32(5) of the CCAA}, and the disclaimer of the lease shall be without prejudice to the Debtors' claim to the fixtures in dispute. Furthermore, in the event that any landlord for the said leased premises for which a notice of disclaimer or resiliation has been sent contests the disclaimer or resiliation, Post-Filing Rent shall not be payable upon the expiry of the notice period provided for in Section 32(5) of the CCAA until the matter is determined by the Court.

[55] DECLARES that, subject to the terms of this paragraph, where GRG USA LLC cannot operate a store in leased premises as a result of a federal, state or county decree, regulation or order (a *"Lockdown Order")*, GRG USA LLC does not use such leased premises from the time such Lockdown Orcier enters into force until the time such Lockdown Orcier is no longer in force (the *"Lockdown Period")* such that no Post-Filing Rent shall be due or payable by GRG USA LLC with respect to those leased premises for the Lockdown Period. This paragraph only applies in respect of Post-Filing Rent payable for leased premises located in the following locations:

(a) Canoga Park, California, USA;

(b) Torrance, California, USA;

(c) Cerritos, California, USA; and

(d) Glendale, California, USA.

[56] APPROVES the Sale Guidelines attached hereto as Schedule A (the *"Sale Guidelines")*, and DECLARES that if there is a conflict between this Orcier and the Sale Guidelines, the former shall govern.

[57] ORDERS that each of the Debtors is authorized to conduct, market and sell (the *"Sale")* the retail inventory located in certain stores {the *"Merchandise")* and of all of the furnishings, fixtures and equipment located therein (the *"FF&E")* in accordance with this Orcier and the Sale Guidelines and to advertise and promote the Sale within the stores in accordance with the Sale Guidelines.

[58] ORDERS that each of the Debtors is authorized to conduct the Sale of the Merchandise and of the FF&E in accordance with the Sale Guidelines, and all rights, title and interest in and to the Merchandise and FF&E shall vest absolutely and exclusively in and with their respective purchaser(s), free and clear of and from any and all claims, liabilities (direct, indirect, absolute or contingent), obligations, interests, prier claims, taxes, security interests (whether contractual, statutory or otherwise), liens, charges (including any charges hereafter granted by this Court in these proceedings), hypothecs, mortgages, pledges, deemed trusts, assignments, judgments, executions, writs of seizure or execution, notices of sale, options, adverse claims, levies, rights of first refusai or other pre-emptive rights in favor of third parties, restrictions on transfer of title, or other claims or encumbrances, whether or not they have attached or been perfected, registered, published or filed and whether secured, unsecured or otherwise, whenever and howsoever arising, and whether such claims arose or came into existence prier to or following the date of this

Orcier (collectively, the *"Encumbrances")*, including, without limiting the generality of the foregoing, all charges, security interests or hypothecs evidenced by registration, publication or filing pursuant to the *Civil Code of Québec*, or any other applicable legislation providing for a security interest in personal or movable property, and, for greater certainty, ORDERS that all of the Encumbrances affecting or relating to the Merchandise and FF&E, be expunged and discharged as against the Merchandise and FF&E, in each case effective as of the sale of the Merchandise and FF&E.

[59] DECLARES that, to the extent that the terms of the applicable leases are in conflict with any term of this Order or the Sale Guidelines, the terms of this Order and the Sale Guidelines shall govern.

[60] DECLARES that nothing contained in this Order or the Sale Guidelines shall be construed to create or impose upon the Debtors any additional restrictions not contained in the Leases.

Gift Cards and Loyalty Programs

[61] AUTHORIZES, notwithstanding anything to the contrary in this Order, the Debtors to continue to honour or comply with any customer deposits, pre-payments, gift cards, store credits, loyalty program and any similar programs offered by the Debtors.

Priorities and General Provisions Relating to CCAA Charges

[62] DECLARES that each of the CCAA Charges shall rank in priority to any and all other hypothecs, mortgages, liens, security interests, priorities, charges, encumbrances or security of whatever nature or kind (collectively, the *"Encumbrances")* affecting the Property whether or not charged by such Encumbrances, except that the Interim Lender Charge shall rank after the Encumbrances securing any obligation, liability or indebtedness pursuant to the credit agreement dated February 28, 2020 entered into amongst GDI, as borrower, National Bank of Canada, as administrative agent (the *"Agent")*, and National Bank of Canada, Bank of Montreal, The Toronto-Dominion Bank and Fédération des Caisses Desjardins du Québec, as lenders (the *"Secured Lenders")*, as amended pursuant to a First Amending Agreement to the Credit Agreement dated as of April 30, 2020 and a Second Amending Agreement to the Credit Agreement dated as of July 3, 2020 (the *"Secured Lenders' Existing Security")*.

[63] DECLARES that the priorities of the Administration Charge and the Directors' Charge (collectively, the *"CCAA Charges")*, as well as the Secured Lenders' Existing Security, as between them with respect to any Property to which they apply, shall be as follows:

(a) first, the Administration Charge; and

(b) second, the Directors' Charge;

(c) third, the Secured Lenders' Existing Security; and

(d) fourth, the Interim Lender Charge.

[64] ORDERS that, except as otherwise expressly provided for herein, the Debtors shall not grant any Encumbrances in or against any Property that rank in priority to, or *pari passu* with, any of the CCAA Charges unless the Debtors, as applicable, obtain the prier written consent of the Monitor and the Debtors, and the prier approval of the Court.

[65] DECLARES that each of the CCAA Charges shall attach, as of the Effective Time, to all present and future Property of the Debtors, notwithstanding any requirement for the consent of any party to any such charge or to comply with any condition precedent.

[66] DECLARES that the CCAA Charges and the rights and remedies of the beneficiaries of the CCAA Charges, as applicable, shall be valid and enforceable and not otherwise be limited or impaired in any way by: (i) these proceedings and the declarations of insolvency made herein; (ii) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such application(s) or any assignment(s) in bankruptcy made or deemed to be made in respect of any of the Debtor; or (iii) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or

the creation of Encumbrances, contained in any agreement, lease, sub-lease, offer to lease or other arrangement which binds the Debtors (a *"Third Party Agreement")*, and notwithstanding any provision to the contrary in any Third Party Agreement:

(a) the creation of any of the CCAA Charges shall not create nor be deemed to constitute a breach by the Debtors of any Third Party Agreement to which any of the Debtor is a party; and

(b) the beneficiaries of the CCAA Charges shall not have any liability to any Debtors whatsoever as a result of any breach of any Third Party Agreement caused by or resulting from the creation of the CCAA Charges.

[67] DECLARES that notwithstanding: (i) these proceedings and the declarations of insolvency made herein; (ii) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such application(s) or any assignment(s) in bankruptcy made or deemed to be made in respect of any of the Debtor; and (iii) the provisions of any federal or provincial statute, the payments or disposition of Property made by any of the Debtor pursuant to this Orcier and the granting of the CCAA Charges, do not and will not constitute settlements, fraudulent preferences, fraudulent conveyances or other challengeable or reviewable transactions or conduct meriting an oppression remedy under any applicable law.

[68] DECLARES that the CCAA Charges shall be valid and enforceable as against ail Property of the Debtors and against ail Persans, including, without limitation, any trustee in bankruptcy, receiver, receiver and manager or interim receiver of the Debtors.

Hearing scheduling and details

[69] ORDERS that, subject to further Orcier of this Court, ail applications in these CCAA proceedings are to be brought on not less than 5 business days' notice to ail Persans on the service list. Each application shall specify a date (the *"Initial Hearing Date")* and time (the *"Initial Hearing Time")* for the hearing and must be communicated along with ail materials that are required for a full comprehension of the application, including, if necessary, a report of the Monitor.

[70] ORDERS that any Persan wishing to abject to the relief sought on an application in these CCAA proceedings must serve a detailed written contestation stating the objection to the application and the grounds for such objection (a *"Contestation")* in writing to the moving party, the Debtors and the Monitor, with a copy to all Persans on the service list, no later than 5 p.m. Montréal Time on the date that is three business days prior to the Initial Hearing Date (the *"Objection Deadline").*

[71] ORDERS that, if no Contestation is served by the Objection Deadline, the Judge having carriage of the application (the *"Presiding Judge")* may determine: (a) whether a hearing is necessary; (b) whether such hearing will be in persan, by telephone or by written submissions only; and (c) the parties from whom submissions are required (collectively, the *"Hearing Details").* In the absence of any such determination, a hearing will be held in the ordinary course.

[72] ORDERS that, if no Contestation is served by the Objection Deadline, the Debtors shall communicate with the Presiding Judge regarding whether a determination has been made by the Presiding Judge concerning the Hearing Details. The Debtors shall thereafter advise the service list of the Hearing Details and the Debtors shall report upon its dissemination of the Hearing Details to the Court in a timely manner.

[73] ORDERS that, if a Contestation is served by the Objection Deadline, the interested parties shall appear before the Presiding Judge on the Initial Hearing Date at the Initial Hearing Time, or such earlier or later time as may be directed by the Court, to, as the Court may direct: (a) proceed with the hearing on the Initial Hearing Date and at the Initial Hearing Time; or (b) establish a schedule for the delivery of materials and the hearing of the contested application and such other matters, including interim relief, as the Court may direct.

General

[74] ORDERS that no Persan shall commence, proceed with or enforce any Proceedings against any of the Directors, employees, legal counsel or financial advisors of the Debtors or of the Monitor in relation to the Business or Property of the Debtors, without

first obtaining leave of this Court, upon ten (10) days' written notice to the Debtors counsel, the Monitor's counsel, and to all those referred to in this paragraph whom it is proposed be named in such Proceedings.

[75] DECLARES that this Order and any proceeding or affidavit leading to this Order, shall not, in and of themselves, constitute a default or failure to comply by the Debtors under any statute, regulation, licence, permit, contract, permission, covenant, agreement, undertaking or other written document or requirement.

[76] DECLARES that, except as otherwise specified herein, the Debtors and the Monitor are at liberty to serve any notice, proof of claim form, proxy, circular or other document in connection with these proceedings by forwarding copies by prepaid ordinary mail, courier, personal delivery or electronic transmission to Persans or other appropriate parties at their respective given addresses as last shown on the records of the Debtors and that any such service shall be deemed to be received on the date of delivery if by personal delivery or electronic transmission, on the following business day if delivered by courier, or three business days after mailing if by ordinary mail.

[77] DECLARES that the Debtors and any party to these proceedings may serve any court materials in these proceedings on all represented parties electronically, by emailing an electronic copy of such materials to counsels' email addresses.

[78] DECLARES that, unless otherwise provided herein, under the CCAA, or ordered by this Court, no document, order or other material need be served on any Persan in respect of these proceedings, unless such Persan has served a Notice of Appearance on counsel for the Debtors and counsel for the Monitor and has filed such notice with this Court, or appears on the service list prepared by counsel for the Monitor, save and except when an order is sought against a Persan not previously involved in these proceedings.

[79] DECLARES that the Debtors or the Monitor may, from time to time, apply to this Court for directions concerning the exercise of their respective powers, duties and rights hereunder or in respect of the proper execution of this Orcier on notice only to each other.

[80] DECLARES that this Orcier and all other orders in these proceedings shall have full force and effect in all provinces and territories in Canada.

[81] AUTHORIZES Groupe Dynamite Inc. to apply as it may consider necessary or desirable, with or without notice, to any other court or administrative body, whether in Canada, the United States of America, or elsewhere, for orders which aid and complement this Orcier and any subsequent orders of this Court and, without limitation to the foregoing, any orders under Chapter 15 of the U.S. Bankruptcy Code, including an order for recognition of these CCAA proceedings as "Foreign Main Proceedings" in the United States of America pursuant to Chapter 15 of the U.S. Bankruptcy Code, and for which Groupe Dynamite Inc. shall be the foreign representative of the Debtors (the *"Foreign Representative").* Ali courts and administrative bodies of all such jurisdictions are hereby respectively requested to make such orders and to provide such assistance to the Debtors and the Foreign Representative as may be deemed necessary or appropriate for that purpose.

[82] REQUESTS the aid and recognition of any Court, tribunal, regulatory or administrative body in Canada, the United States of America or elsewhere, to give effect to this Orcier and to assist the Debtors, the Monitor and their respective agents in carrying out the terms of this Orcier. Ali Courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Debtors, and the Monitor as may be necessary or desirable to give effect to this Orcier, to grant representative status to the Monitor or the authorized representative of the Debtors in any foreign proceeding, to assist the Debtors, and the Monitor, and to act in aid of and to be complementary to this Court, in carrying out the terms of this Orcier.

[83] DECLARES that, for the purposes of any applications authorized by paragraphs [81] and [82], Debtors' centre of main interest is located in the province of Québec, Canada.

[84] ORDERS that Exhibit P-2, Appendices B, C and D to Exhibit P-6, and the Appendices to the Second Report of the Monitor dated September 16, 2020 in support of the Application are confidential and are filed under seal, and PRAYS ACT of the Debtors' undertaking to communicate any of those exhibits to certain creditors following an undertaking of confidentiality.

[85] ORDERS the provisional execution of this Orcier notwithstanding any appeal.

The Honourable Peter Kalichman, J.S.C.

ScheduleA

SALE GUIDELINES

The following procedures shall apply to any sales to be held by either Groupe Dynamite Inc., GRG USA Holdings Inc., and GRG USA LLC, (each, *"Groupe Dynamite")* at stores for which Groupe Dynamite sent a notice pursuant to section 32 of the *Companies' Creditors Arrangement Act* (respectively the *"Stores"* and the *"CCAA").* Terms capitalized but not defined in these Sale Guidelines have the meanings ascribed to them in the order rendered by the Superior Court of Québec (Commercial Division) (the *"Court")* in the file bearing number 500-11-058763-208 on September 8, 2020 (the *"Canadian Order"),* which Canadian Order was approved by the United States Bankruptcy Court for the District of Delaware on September 9, 2020, under Chapter 15 of the US Bankruptcy Code (the *"US Order").* In the Sale Guidelines below, the term *"Order"* means either the Canadian Order if the Store is located in Canada or the Canadian Order as approved by the US Order if the Store is located in the United States,

1. Except as otherwise expressly set out herein, and subject to: (i) the Order; or (ii) the provisions of the CCAA and any further Order of the Court; or (iii) any subsequent written agreement between Groupe Dynamite and its applicable landlord(s) (individually, a *"Landlord"* and, collectively, the *"Landlords"),* the Sale shall be conducted in accordance with the terms of the applicable leases and other occupancy agreements for each of the Stores (individually, a *"Lease"* and, collectively, the *"Leases").* However, nothing contained herein shall be construed to create or impose upon Groupe Dynamite any additional restrictions not contained in the applicable Lease or other occupancy agreement.

2. The Sale shall be conducted so that each of the Stores remain open during their normal hours of operation provided for in the respective Lease for the Stores until Groupe Dynamite vacates the leased premises, it being understood that Groupe Dynamite shall have vacated the Stores no later than the earliest of: (i) the expiry of the notice period provided for in the notice to disclaim or resiliate the respective Lease and (ii) 90 days following the date of the notice to disclaim or resiliate the respective Lease, unless otherwise agreed between Groupe Dynamite and the applicable Landlord or ordered by the Court (the *"Vacate Date").* Groupe Dynamite will be entitled to start the liquidation on the day a termination or disclaimer notice is sent for a specific Store.

3. he Sale shall be conducted in accordance with applicable federal, provincial, state and unicipal laws, unless otherwise ordered by the Court.

4. Il display and hanging signs used in connection with the Sale shall be professionally produced and all hanging signs shall be hung in a professional manner. Notwithstanding anything to the contrary contained in the Leases, Groupe Dynamite may advertise the Sale at the Stores as a "everything on sale", "everything must go", "store closing" or similar theme sale at the Stores provided however that no signs shall advertise the Sale as a "bankruptcy", a "liquidation" or a "going out of business" sale, it being understood that the French equivalent of "clearance" is liquidation" and that "liquidation" is permitted to be used in French language signs). Forthwith pan request, Groupe Dynamite shall provide the proposed signage packages along with proposed dimensions by e-mail or facsimile to the applicable Landlords or to their counsel of record and the applicable Landlord shall notify Groupe Dynamite of any requirement for such signage to otherwise comply with the terms of the Lease and/or the Sale Guidelines and where the provisions of the Lease conflicts with these Sale Guidelines, these Sale Guidelines shall govern. Groupe Dynamite shall not use neon or day-glow signs or any handwritten signage save that handwritten "you pay" or "topper" signs may be used). If a Landlord is concerned with "Store Closing"

signs being placed in the front window of a Store or with the number or size of the signs in the front window, Groupe Dynamite and the Landlord will work together to resolve the dispute. Nothing contained herein shall be construed to create or impose upon Groupe Dynamite any additional restrictions not contained in the applicable Leases. In addition, Groupe Dynamite shall be permitted to utilize exterior banners/signs at stand alone or strip mall Stores or enclosed mall Store locations with a separate entrance from the exterior of the enclosed mall; provided, however, that: (i) no signage in any other common areas of a mall shall be used; and (ii) where such banners are not explicitly permitted by the applicable Lease and the Landlord requests in writing that banners are not to be used, then no banners shall be used absent further order of the Court, which may be sought on an expedited basis on notice to the Service List. Any banners used shall be located or hung so as to make clear that the Sale is being conducted only at the affected Store and shall not be wider than the premises occupied by the affected Store. All exterior banners shall be professionally hung and to the extent that there is any damage to the facade of the premises of a Store as a result of the hanging or removal of the exterior banner, such damage shall be professionally repaired at the expense of Groupe Dynamite. Groupe Dynamite shall not utilize any commercial trucks to advertise the Sale on Landlord's property or mall ring roads.

5. Groupe Dynamite shall be permitted to utilize sign walkers and street signage; provided, however, such sign walkers and street signage shall not be located on the shopping centre or mall premises.

6. Groupe Dynamite shall be entitled to include additional merchandise in the Sale; provided that (a) the additional merchandise is currently in the possession of Groupe Dynamite or any of its affiliates (including in their warehouses) or has previously been ordered by or on behalf of Groupe Dynamite or its affiliates; and (b) the additional merchandise is of like kind and category and no lesser quality to Groupe Dynamite merchandise, and consistent with any restriction on usage of the Stores set out in applicable Leases.

7. Conspicuous signs shall be posted in the cash register areas of each Store to the effect that all sales are "final" and customers with any questions or complaints are to contact Groupe Dynamite.

8. Groupe Dynamite shall not distribute handbills, leaflets or other written materials to customers outside of any of the Stores on Landlord's property, unless explicitly permitted by the applicable Lease or, if distribution is customary in the shopping centre in which the Store is located. Otherwise, Groupe Dynamite may solicit customers in the Stores themselves. Groupe Dynamite shall not use any giant balloons, flashing lights or amplified sound to advertise the Sale or solicit customers, except as explicitly permitted under the applicable Lease or agreed to by the Landlord.

9. At the conclusion of the Sale in each Store, Groupe Dynamite shall arrange that the premises for each Store are in "broom-swept" and clean condition, and shall arrange that the Stores are in the same condition as on the commencement of the Sale, ordinary wear and tear excepted. No property of any Landlord of a Store shall be removed or sold during the Sale. No permanent fixtures (other than Groupe Dynamite FF&E (as defined below) for clarity) may be removed without the Landlord's written consent unless otherwise provided by the applicable Lease and in accordance with the Order. Any trade fixtures or personal property left in a Store after the applicable Vacate Date in respect of which the applicable Lease has been disclaimed by Group Dynamite shall be deemed abandoned, with the applicable Landlord having the right to dispose of the same as the Landlord chooses, without any liability whatsoever on the part of the Groupe Dynamite.

10. Subject to the terms of paragraph 8 above, Groupe Dynamite may sell its furniture, fixtures and equipment *("FF&E")* located in the Stores during the Sale. For greater certainty, FF&E does not include any portion of the Stores' HVAC, sprinkler, fire suppression and fire alarm systems. Groupe Dynamite may advertise the sale of FF&E consistent with these Sale Guidelines on the understanding that the Landlord may require such signs to be placed in discreet locations within the Stores reasonably acceptable to the Landlord. Additionally, the purchasers of any FF&E sold during the Sale shall only be permitted to remove the FF&E either through the back shipping areas designated by the Landlord or through other areas after regular Store business hours or, through the front door of the Store during Store business hours if the FF&E can fit in a shopping bag, with Landlord's supervision as required by the Landlord and in accordance with the Order. Groupe Dynamite shall repair any damage to the Stores resulting from the removal of any FF&E by third party purchasers of FF&E. Any FF&E not sold as at the Vacate Date shall be deemed abandoned.

11. Groupe Dynamite shall not make any alterations to interior or exterior Store lighting, except in respect of the movable track light system or as authorized pursuant to the affected Lease. The hanging of exterior banners or other signage, where permitted in accordance with the terms of these Sale Guidelines, shall not constitute an alteration to a Store.

12. Groupe Dynamite hereby provides notice to the Landlords of its intention to sell and remove FF&E from the Stores. Groupe Dynamite shall make commercially reasonable efforts to arrange with each Landlord that so requests, a walk-through to identify the FF&E subject to the Sale. The relevant Landlord shall be entitled upon request to have a representative present in the applicable Stores to observe such removal. If the Landlord disputes Groupe Dynamite's entitlement to sell or remove any FF&E under the provisions of the Lease, such FF&E shall remain on the premises and shall be dealt with as agreed between Groupe Dynamite and such Landlord, or by further order of the Court upon application by Groupe Dynamite on at least two (2) days' notice to such Landlord and the Monitor.

13. hen a notice of disclaimer or resiliation is delivered pursuant to the CCAA to a Landlord and he Store in question has not yet been vacated, then: (a) during the notice period prior to the effective time of the disclaimer or resiliation, the Landlord may show the affected leased premises to prospective tenants during normal business hours, on giving Groupe Dynamite and the Monitor 24 hours' prior written notice; and (b) at the effective time of the disclaimer or resiliation, the relevant Landlord shall be entitled to take possession of any such Store without faiver of or prejudice to any claims or rights such Landlord may have against Groupe Dynamite in respect of such Lease or Store, provided that nothing herein shall relieve such Landlord of any obligation to mitigate any damages claimed in connection therewith.

14. Groupe Dynamite and the Landlords shall have the rights of access to the Stores during the Sale provided for in the applicable Lease (subject, for greater certainty, to any applicable stay of proceedings).

15. Groupe Dynamite shall not conduct any auctions of Merchandise or FF&E at any of the Stores.

16. Groupe Dynamite shall designate a party to be contacted by the Landlords should a dispute arise concerning the conduct of the Sale. The initial contact shall be Ciro Falluh who may be reached by phone at +1 514-733-3962 ext.: 684 or email at *cfalluh@dynamite.ca*. If the parties are unable to resolve the dispute between themselves, the Landlord or Groupe Dynamite shall have the right to schedule a "status hearing" before the Court on no less than two (2) days written notice to the other party or parties, subject to the availability of the Court, during which time Groupe Dynamite shall cease all activity in dispute other than activity expressly permitted herein, pending determination of the matter by the Court; provided, however, subject to paragraph 4 of these Sale Guidelines, if a banner has been hung in accordance with these Sale Guidelines and is the subject of a dispute, Groupe Dynamite shall not be required to take any such banner down pending determination of any dispute.

17. Nothing herein is or shall be deemed to be a consent by any Landlord to the sale, assignment or transfer of any Lease, or shall, or shall be deemed to, or grant to the Landlord any greater rights than already exist under the terms of any applicable Lease.

18. These Sale Guidelines may be amended by written agreement between Groupe Dynamite and the applicable Landlord.

Footnotes

1 *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522.

2 *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522, par. 55.

3 *Toronto Star Newspapers Ltd. v. Ontario*, [2005] 2 S.C.R. 188, par. 25.

1993 CarswellOnt 183
Ontario Court of Justice (General Division — Commercial List)

Lehndorff General Partner Ltd., Re

1993 CarswellOnt 183, [1993] O.J. No. 14, 17 C.B.R. (3d) 24, 37 A.C.W.S. (3d) 847, 9 B.L.R. (2d) 275

Re Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36; Re Courts of Justice Act, R.S.O. 1990, c. C-43; Re plan of compromise in respect of LEHNDORFF GENERAL PARTNER LTD. (in its own capacity and in its capacity as general partner of LEHNDORFF UNITED PROPERTIES (CANADA), LEHNDORFF PROPERTIES (CANADA) and LEHNDORFF PROPERTIES (CANADA) II) and in respect of certain of their nominees LEHNDORFF UNITED PROPERTIES (CANADA) LTD., LEHNDORFF CANADIAN HOLDINGS LTD., LEHNDORFF CANADIAN HOLDINGS II LTD., BAYTEMP PROPERTIES LIMITED and 102 BLOOR STREET WEST LIMITED and in respect of THG LEHNDORFF VERMÖGENSVERWALTUNG GmbH (in its capacity as limited partner of LEHNDORFF UNITED PROPERTIES (CANADA))

Farley J.

Heard: December 24, 1992
Judgment: January 6, 1993
Docket: Doc. B366/92

Counsel: *Alfred Apps, Robert Harrison* and *Melissa J. Kennedy* , for applicants.
L. Crozier , for Royal Bank of Canada.
R.C. Heintzman , for Bank of Montreal.
J. Hodgson, Susan Lundy and *James Hilton* , for Canada Trustco Mortgage Corporation.
Jay Schwartz , for Citibank Canada.
Stephen Golick , for Peat Marwick Thorne * Inc., proposed monitor.
John Teolis , for Fuji Bank Canada.
Robert Thorton , for certain of the advisory boards.

***Farley J.*:**

1 These are my written reasons relating to the relief granted the applicants on December 24, 1992 pursuant to their application under the *Companies' Creditors Arrangement Act* , R.S.C. 1985, c. C-36 ("CCAA") and the *Courts of Justice Act* , R.S.O. 1990, c. C.43 ("CJA"). The relief sought was as follows:

(a) short service of the notice of application;

(b) a declaration that the applicants were companies to which the CCAA applies;

(c) authorization for the applicants to file a consolidated plan of compromise;

(d) authorization for the applicants to call meetings of their secured and unsecured creditors to approve the consolidated plan of compromise;

(e) a stay of all proceedings taken or that might be taken either in respect of the applicants in their own capacity or on account of their interest in Lehndorff United Properties (Canada) ("LUPC"), Lehndorff Properties (Canada) ("LPC") and

Lehndorff Properties (Canada) II ("LPC II") and collectively (the "Limited Partnerships") whether as limited partner, as general partner or as registered titleholder to certain of their assets as bare trustee and nominee; and

(f) certain other ancillary relief.

2 The applicants are a number of companies within the larger Lehndorff group ("Group") which operates in Canada and elsewhere. The group appears to have suffered in the same way that a number of other property developers and managers which have also sought protection under the CCAA in recent years. The applicants are insolvent; they each have outstanding debentures issues under trust deeds; and they propose a plan of compromise among themselves and the holders of these debentures as well as those others of their secured and unsecured creditors as they deemed appropriate in the circumstances. Each applicant except THG Lehndorff Vermögensverwaltung GmbH ("GmbH") is an Ontario corporation. GmbH is a company incorporated under the laws of Germany. Each of the applicants has assets or does business in Canada. Therefore each is a "company" within the definition of s. 2 of the CCAA. The applicant Lehndorff General Partner Ltd. ("General Partner Company") is the sole general partner of the Limited Partnerships. The General Partner Company has sole control over the property and businesses of the Limited Partnerships. All major decisions concerning the applicants (and the Limited Partnerships) are made by management operating out of the Lehndorff Toronto Office. The applicants aside from the General Partner Company have as their sole purpose the holding of title to properties as bare trustee or nominee on behalf of the Limited Partnerships. LUPC is a limited partnership registered under the *Limited Partnership Act* , R.S.O. 1990, c. L.16 ("Ontario LPA"). LPC and LPC II are limited partnerships registered under Part 2 of the *Partnership Act* , R.S.A. 1980, c. P-2 ("Alberta PA") and each is registered in Ontario as an extra provincial limited partnership. LUPC has over 2,000 beneficial limited partners, LPC over 500 and LPC II over 250, most of whom are residents of Germany. As at March 31, 1992 LUPC had outstanding indebtedness of approximately $370 million, LPC $45 million and LPC II $7 million. Not all of the members of the Group are making an application under the CCAA. Taken together the Group's indebtedness as to Canadian matters (including that of the applicants) was approximately $543 million. In the summer of 1992 various creditors (Canada Trustco Mortgage Company, Bank of Montreal, Royal Bank of Canada, Canadian Imperial Bank of Commerce and the Bank of Tokyo Canada) made demands for repayment of their loans. On November 6, 1992 Funtanua Investments Limited, a minor secured lendor also made a demand. An interim standstill agreement was worked out following a meeting of July 7, 1992. In conjunction with Peat Marwick Thorne Inc. which has been acting as an informal monitor to date and Fasken Campbell Godfrey the applicants have held multiple meetings with their senior secured creditors over the past half year and worked on a restructuring plan. The business affairs of the applicants (and the Limited Partnerships) are significantly intertwined as there are multiple instances of intercorporate debt, cross-default provisions and guarantees and they operated a centralized cash management system.

3 This process has now evolved to a point where management has developed a consolidated restructuring plan which plan addresses the following issues:

(a) The compromise of existing conventional, term and operating indebtedness, both secured and unsecured.

(b) The restructuring of existing project financing commitments.

(c) New financing, by way of equity or subordinated debt.

(d) Elimination or reduction of certain overhead.

(e) Viability of existing businesses of entities in the Lehndorff Group.

(f) Restructuring of income flows from the limited partnerships.

(g) Disposition of further real property assets aside from those disposed of earlier in the process.

(h) Consolidation of entities in the Group; and

(i) Rationalization of the existing debt and security structure in the continuing entities in the Group.

Formal meetings of the beneficial limited partners of the Limited Partnerships are scheduled for January 20 and 21, 1993 in Germany and an information circular has been prepared and at the time of hearing was being translated into German. This application was brought on for hearing at this time for two general reasons: (a) it had now ripened to the stage of proceeding with what had been distilled out of the strategic and consultative meetings; and (b) there were creditors other than senior secured lenders who were in a position to enforce their rights against assets of some of the applicants (and Limited Partnerships) which if such enforcement did take place would result in an undermining of the overall plan. Notice of this hearing was given to various creditors: Barclays Bank of Canada, Barclays Bank PLC, Bank of Montreal, Citibank Canada, Canada Trustco Mortgage Corporation, Royal Trust Corporation of Canada, Royal Bank of Canada, the Bank of Tokyo Canada, Funtauna Investments Limited, Canadian Imperial Bank of Commerce, Fuji Bank Canada and First City Trust Company. In this respect the applicants have recognized that although the initial application under the CCAA may be made on an ex parte basis (s. 11 of the CCAA; *Re Langley's Ltd.*, [1938] O.R. 123, [1938] 3 D.L.R. 230 (C.A.) ; *Re Keppoch Development Ltd.* (1991), 8 C.B.R. (3d) 95 (N.S. T.D.) . The court will be concerned when major creditors have not been alerted even in the most minimal fashion (*Re Inducon Development Corp.* (1992), 8 C.B.R. (3d) 306 (Ont. Gen. Div.) at p. 310). The application was either supported or not opposed.

4 "Instant" debentures are now well recognized and respected by the courts: see *Re United Maritime Fishermen Co-operative* (1988), 67 C.B.R. (N.S.) 44 (N.B. Q.B.) , at pp. 55-56, varied on reconsideration (1988), 68 C.B.R. (N.S.) 170 (N.B. Q.B.) , reversed on different grounds (1988), 69 C.B.R. (N.S.) 161 (N.B. C.A.) , at pp. 165-166; *Re Stephanie's Fashions Ltd.* (1990), 1 C.B.R. (3d) 248 (B.C. S.C.) at pp. 250-251; *Nova Metal Products Inc. v. Comiskey (Trustee of)* (sub nom. *Elan Corp. v. Comiskey*) (1990), 1 O.R. (3d) 289, 1 C.B.R. (3d) 101 (C.A.) per Doherty J.A., dissenting on another point, at pp. 306-310 (O.R.); *Ultracare Management Inc. v. Zevenberger (Trustee of)* (sub nom. *Ultracare Management Inc. v. Gammon*) (1990), 1 O.R. (3d) 321 (Gen. Div.) at p. 327. The applicants would appear to me to have met the technical hurdle of s. 3 and as defined s. 2) of the CCAA in that they are debtor companies since they are insolvent, they have outstanding an issue of debentures under a trust deed and the compromise or arrangement that is proposed includes that compromise between the applicants and the holders of those trust deed debentures. I am also satisfied that because of the significant intertwining of the applicants it would be appropriate to have a consolidated plan. I would also understand that this court (Ontario Court of Justice (General Division)) is the appropriate court to hear this application since all the applicants except GmbH have their head office or their chief place of business in Ontario and GmbH, although it does not have a place of business within Canada, does have assets located within Ontario.

5 The CCAA is intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy and, as such, is remedial legislation entitled to a liberal interpretation. It seems to me that the purpose of the statute is to enable insolvent companies to carry on business in the ordinary course or otherwise deal with their assets so as to enable plan of compromise or arrangement to be prepared, filed and considered by their creditors and the court. In the interim, a judge has great discretion under the CCAA to make order so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors. See the preamble to and sections 4, 5, 6, 7, 8 and 11 of the CCAA; *Reference re Companies' Creditors Arrangement Act*, [1934] S.C.R. 659 at p. 661, 16 C.B.R. 1, [1934] 4 D.L.R. 75 ; *Meridian Developments Inc. v. Toronto Dominion Bank*, [1984] 5 W.W.R. 215 (Alta. Q.B.) at pp. 219-220; *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 1, 63 Alta. L.R. (2d) 361 (Q.B.) , at pp. 12-13 (C.B.R.); *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 2 C.B.R. (3d) 303 (B.C. C.A.) , at pp. 310-311, affirming (1990), 2 C.B.R. (3d) 291, 47 B.C.L.R. (2d) 193 (S.C.) , leave to appeal to S.C.C. dismissed (1991), 7 C.B.R. (3d) 164 (S.C.C.) .; *Nova Metal Products Inc. v. Comiskey (Trustee of)* , supra, at p. 307 (O.R.); *Fine's Flowers v. Fine's Flowers (Creditors of)* (1992), 7 O.R. (3d) 193 (Gen. Div.) , at p. 199 and "Reorganizations Under The Companies' Creditors Arrangement Act", Stanley E. Edwards (1947) 25 Can. Bar Rev. 587 at p. 592.

6 The CCAA is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. Where a debtor company realistically plans to continue operating or to otherwise deal with its assets but it requires the protection of the court in order to do so and it is otherwise too early for the court to determine whether the debtor company will succeed, relief should be granted under the CCAA. see *Nova Metal Products Inc. v. Comiskey*

(Trustee of) , supra at pp. 297 and 316; *Re Stephanie's Fashions Ltd.* , supra, at pp. 251-252 and *Ultracare Management Inc. v. Zevenberger (Trustee of)* , supra, at p. 328 and p. 330. It has been held 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: see *Meridian Developments Inc. v. Toronto Dominion Bank* , supra, at p. 220 (W.W.R.). The possibility that one or more creditors may be prejudiced should not affect the court's exercise of its authority to grant a stay of proceedings under the CCAA because this affect is offset by the benefit to all creditors and to the company of facilitating a reorganization. The court's primary concerns under the CCAA must be for the debtor and *all* of the creditors: see *Quintette Coal Ltd. v. Nippon Steel Corp.* , supra, at pp. 108-110; *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311, 51 B.C.L.R. (2d) 84 (C.A.) , at pp. 315-318 (C.B.R.) and *Re Stephanie's Fashions Ltd.* , supra, at pp. 251-252.

7 One of the purposes of the CCAA is to facilitate ongoing operations of a business where its assets have a greater value as part of an integrated system than individually. The CCAA facilitates reorganization of a company where the alternative, sale of the property piecemeal, is likely to yield far less satisfaction to the creditors. Unlike the *Bankruptcy Act* , R.S.C. 1985, c. B-3, before the amendments effective November 30, 1992 to transform it into the *Bankruptcy and Insolvency Act* ("BIA"), it is possible under the CCAA to bind secured creditors it has been generally speculated that the CCAA will be resorted to by companies that are generally larger and have a more complicated capital structure and that those companies which make an application under the BIA will be generally smaller and have a less complicated structure. Reorganization may include partial liquidation where it is intended as part of the process of a return to long term viability and profitability. See *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* , supra, at p. 318 and *Re Associated Investors of Canada Ltd.* (1987), 67 C.B.R. (N.S.) 237 (Alta. Q.B.) at pp. 245, reversed on other grounds at (1988), 71 C.B.R. (N.S.) 71 (Alta. C.A.) . It appears to me that the purpose of the CCAA is also to protect the interests of creditors and to enable an orderly distribution of the debtor company's affairs. This may involve a winding-up or liquidation of a company or simply a substantial downsizing of its business operations, provided the same is proposed in the best interests of the creditors generally. See *Re Associated Investors of Canada Ltd.* , supra, at p. 318; *Re Amirault Fish Co.*, 32 C.B.R. 186, [1951] 4 D.L.R. 203 (N.S. T.D.) at pp. 187-188 (C.B.R.).

8 It strikes me that each of the applicants in this case has a realistic possibility of being able to continue operating, although each is currently unable to meet all of its expenses albeit on a reduced scale. This is precisely the sort of circumstance in which all of the creditors are likely to benefit from the application of the CCAA and in which it is appropriate to grant an order staying proceedings so as to allow the applicant to finalize preparation of and file a plan of compromise and arrangement.

9 Let me now review the aspect of the stay of proceedings. Section 11 of the CCAA provides as follows:

> 11. Notwithstanding anything in the *Bankruptcy Act* or the *Winding-up Act* , whenever an application has been made under this Act in respect of any company, the court, on the application of any person interested in the matter, may, on notice to any other person or without notice as it may see fit,
>
> (*a*) make an order staying, until such time as the court may prescribe or until any further order, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy Act* and the *Winding-up Act* or either of them;
>
> (*b*) restrain further proceedings in any action, suit or proceeding against the company on such terms as the court sees fit; and
>
> (*c*) make an order that no suit, action or other proceeding shall be proceeded with or commenced against the company except with the leave of the court and subject to such terms as the court imposes.

10 The power to grant a stay of proceeding should be construed broadly in order to permit the CCAA to accomplish its legislative purpose and in particular to enable continuance of the company seeking CCAA protection. The power to grant a stay therefore extends to a stay which affected the position not only of the company's secured and unsecured creditors, but also all non-creditors and other parties who could potentially jeopardize the success of the plan and thereby the continuance of the company. See *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* , supra, at pp. 12-17 (C.B.R.) and *Quintette Coal*

Ltd. v. Nippon Steel Corp. , supra, at pp. 296-298 (B.C. S.C.) and pp. 312-314 (B.C. C.A.) and *Meridian Developments Inc. v. Toronto Dominion Bank* , supra, at pp. 219 ff. Further the court has the power to order a stay that is effective in respect of the rights arising in favour of secured creditors under all forms of commercial security: see *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* , supra, at p. 320 where Gibbs J.A. for the court stated:

> The trend which emerges from this sampling will be given effect here by holding that where the word "security" occurs in the C.C.A.A., it includes s. 178 security and, where the word creditor occurs, it includes a bank holding s. 178 security. To the extent that there may be conflict between the two statutes, therefore, the broad scope of the C.C.A.A. prevails.

11 The power to grant a stay may also extend to preventing persons seeking to terminate or cancel executory contracts, including, without limitation agreements with the applying companies for the supply of goods or services, from doing so: see *Gaz Métropolitain v. Wynden Canada Inc.* (1982), 44 C.B.R. (N.S.) 285 (C.S. Que.) at pp. 290-291 and *Quintette Coal Ltd. v. Nippon Steel Corp.* , supra, at pp. 311-312 (B.C. C.A.). The stay may also extend to prevent a mortgagee from proceeding with foreclosure proceedings (see *Re Northland Properties Ltd.* (1988), 73 C.B.R. (N.S.) 141 (B.C. S.C.) or to prevent landlords from terminating leases, or otherwise enforcing their rights thereunder (see *Feifer v. Frame Manufacturing Corp.* (1947), 28 C.B.R. 124 (C.A. Que.)). Amounts owing to landlords in respect of arrears of rent or unpaid rent for the unexpired portion of lease terms are properly dealt with in a plan of compromise or arrangement: see *Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia* (1991), 8 C.B.R. (3d) 312 (Ont. Gen. Div.) especially at p. 318. The jurisdiction of the court to make orders under the CCAA in the interest of protecting the debtor company so as to enable it to prepare and file a plan is effective notwithstanding the terms of any contract or instrument to which the debtor company is a party. Section 8 of the CCAA provides:

> 8. This Act extends and does not limit the provisions of any instrument now or hereafter existing that governs the rights of creditors or any class of them and has full force and effect notwithstanding anything to the contrary contained in that instrument.

The power to grant a stay may also extend to prevent persons from exercising any right of set off in respect of the amounts owed by such a person to the debtor company, irrespective of whether the debtor company has commenced any action in respect of which the defense of set off might be formally asserted: see *Quintette Coal Ltd. v. Nippon Steel Corp.* , supra, at pp. 312-314 (B.C.C.A.).

12 It was submitted by the applicants that the power to grant a stay of proceedings may also extend to a stay of proceedings against non-applicants who are not companies and accordingly do not come within the express provisions of the CCAA. In support thereof they cited a CCAA order which was granted staying proceedings against individuals who guaranteed the obligations of a debtor-applicant which was a qualifying company under the terms of the CCAA: see *Re Slavik* , unreported, [1992] B.C.J. No. 341 [now reported at 12 C.B.R. (3d) 157 (B.C. S.C.)]. However in the *Slavik* situation the individual guarantors were officers and shareholders of two companies which had sought and obtained CCAA protection. Vickers J. in that case indicated that the facts of that case included the following unexplained and unamplified fact [at p. 159]:

> 5. The order provided further that all creditors of Norvik Timber Inc. be enjoined from making demand for payment upon that firm or upon any guarantor of an obligation of the firm until further order of the court.

The CCAA reorganization plan involved an assignment of the claims of the creditors to "Newco" in exchange for cash and shares. However the basis of the stay order originally granted was not set forth in this decision.

13 It appears to me that Dickson J. in *International Donut Corp. v. 050863 N.D. Ltd.* , unreported, [1992] N.B.J. No. 339 (N.B. Q.B.) [now reported at 127 N.B.R. (2d) 290, 319 A.P.R. 290] was focusing only on the stay arrangements of the CCAA when concerning a limited partnership situation he indicated [at p. 295 N.B.R.]:

> In August 1991 the limited partnership, through its general partner the plaintiff, applied to the Court under the *Companies' Creditors Arrangement Act* , R.S.C., c. C-36 for an order delaying the assertion of claims by creditors until an opportunity could be gained to work out with the numerous and sizable creditors a compromise of their claims. An order was obtained but it in due course expired without success having been achieved in arranging with creditors a compromise. *That effort may*

have been wasted, because it seems questionable that the federal Act could have any application to a limited partnership in circumstances such as these . (Emphasis added.)

14 I am not persuaded that the words of s. 11 which are quite specific as relating as to a *company* can be enlarged to encompass something other than that. However it appears to me that Blair J. was clearly in the right channel in his analysis in *Campeau v. Olympia & York Developments Ltd.* unreported, [1992] O.J. No. 1946 [now reported at 14 C.B.R. (3d) 303 (Ont. Gen. Div.)] at pp. 4-7 [at pp. 308-310 C.B.R.].

The Power to Stay

The court has always had an inherent jurisdiction to grant a stay of proceedings whenever it is just and convenient to do so, in order to control its process or prevent an abuse of that process: see *Canada Systems Group (EST) Ltd. v. Allendale Mutual Insurance Co.* (1982), 29 C.P.C. 60, 137 D.L.R. (3d) 287 (Ont. H.C.) , and cases referred to therein. In the civil context, this general power is also embodied in the very broad terms of s. 106 of the *Courts of Justice Act* , R.S.O. 1990, c. C.43, which provides as follows:

> 106. A court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just.

Recently, Mr. Justice O'Connell has observed that this discre tionary power is "highly dependent on the facts of each particular case": *Arab Monetary Fund v. Hashim* (unreported) [(June 25, 1992), Doc. 24127/88 (Ont. Gen. Div.)], [1992] O.J. No. 1330.

Apart from this inherent and general jurisdiction to stay proceedings, there are many instances where the court is specifically granted the power to stay in a particular context, by virtue of statute or under the *Rules of Civil Procedure* . The authority to prevent multiplicity of proceedings in the same court, under r. 6.01(1), is an example of the latter. The power to stay judicial and extra-judicial proceedings under s. 11 of the C.C.A.A., is an example of the former. Section 11 of the C.C.A.A. provides as follows.

The Power to Stay in the Context of C.C.A.A. Proceedings

By its formal title the C.C.A.A. is known as "An Act to facilitate compromises and arrangements between companies and their creditors". To ensure the effective nature of such a "facilitative" process it is essential that the debtor company be afforded a respite from the litigious and other rights being exercised by creditors, while it attempts to carry on as a going concern and to negotiate an acceptable corporate restructuring arrangement with such creditors.

In this respect it has been observed that the C.C.A.A. is "to be used as a practical and effective way of restructuring corporate indebtedness.": see the case comment following the report of *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 1, 63 Alta. L.R. (2d) 361, 92 A.R. 81 (Q.B.) , and the approval of that remark as "a perceptive observation about the attitude of the courts" by Gibbs J.A. in *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 51 B.C.L.R. (2d) 105 (C.A.) at p. 113 [B.C.L.R.].

Gibbs J.A. continued with this comment:

> To the extent that a general principle can be extracted from the few cases directly on point, and the others in which there is persuasive obiter, it would appear to be that the courts have concluded that under s. 11 there is *a discretionary power to restrain judicial or extra-judicial conduct* against the debtor company *the effect of which is, or would be, seriously to impair the ability of the debtor company to continue in business during the compromise or arrangement negotiating period* .

(emphasis added)

I agree with those sentiments and would simply add that, in my view, the restraining power extends as well to conduct which could seriously impair the debtor's ability to focus and concentrate its efforts on the business purpose of negotiating the compromise or arrangement. [In this respect, see also *Sairex GmbH v. Prudential Steel Ltd.* (1991), 8 C.B.R. (3d) 62 (Ont. Gen. Div.) at p. 77.]

I must have regard to these foregoing factors while I consider, as well, the general principles which have historically governed the court's exercise of its power to stay proceedings. These principles were reviewed by Mr. Justice Montgomery in *Canada Systems Group (EST) Ltd. v. Allendale Mutual Insurance* , supra (a "Mississauga Derailment" case), at pp. 65-66 [C.P.C.]. The balance of convenience must weigh significantly in favour of granting the stay, as a party's right to have access to the courts must not be lightly interfered with. The court must be satisfied that a continuance of the proceeding would serve as an injustice to the party seeking the stay, in the sense that it would be oppressive or vexatious or an abuse of the process of the court in some other way. The stay must not cause an injustice to the plaintiff.

It is quite clear from *Empire-Universal Films Limited v. Rank*, [1947] O.R. 775 (H.C.) that McRuer C.J.H.C. considered that *The Judicature Act* [R.S.O. 1937, c. 100] then [and now the CJA] merely confirmed a statutory right that previously had been considered inherent in the jurisdiction of the court with respect to its authority to grant a stay of proceedings. See also *McCordic v. Bosanquet* (1974), 5 O.R. (2d) 53 (H.C.) and *Canada Systems Group (EST) Ltd. v. Allen-Dale Mutual Insurance Co.* (1982), 29 C.P.C. 60 (H.C.) at pp. 65-66.

15 Montgomery J. in *Canada Systems* , supra, at pp. 65-66 indicated:

Goodman J. (as he then was) in *McCordic v. Bosanquet* (1974), 5 O.R. (2d) 53 in granting a stay reviewed the authorities and concluded that the inherent jurisdiction of the Court to grant a stay of proceedings may be made whenever it is just and reasonable to do so. "This court has ample jurisdiction to grant a stay whenever it is just and reasonable to do so." (Per Lord Denning M.R. in *Edmeades v. Thames Board Mills Ltd.*, [1969] 2 Q.B. 67 at 71, [1969] 2 All E.R. 127 (C.A.)). Lord Denning's decision in *Edmeades* was approved by Lord Justice Davies in *Lane v. Willis; Lane v. Beach (Executor of Estate of George William Willis)*, [1972] 1 All E.R. 430, *(*sub nom. *Lane v. Willis; Lane v. Beach)* [1972] 1 W.L.R. 326 (C.A.) .

. . . . .

In *Weight Watchers Int. Inc. v. Weight Watchers of Ont. Ltd.* (1972), 25 D.L.R. (3d) 419, 5 C.P.R. (2d) 122 , appeal allowed by consent without costs *(*sub nom. *Weight Watchers of Ont. Ltd. v. Weight Watchers Inc. Inc.)* 42 D.L.R. (3d) 320n, 10 C.P.R. (2d) 96n (Fed. C.A.) , Mr. Justice Heald on an application for stay said at p. 426 [25 D.L.R.]:

> The principles which must govern in these matters are clearly stated in the case of *Empire Universal Films Ltd. et al. v. Rank et al.*, [1947] O.R. 775 at p. 779, as follows [quoting *St. Pierre et al. v. South American Stores (Gath & Chaves), Ltd. et al.*, [1936] 1 K.B. 382 at p. 398]:
>
> > (1.) A mere balance of convenience is not a sufficient ground for depriving a plaintiff of the advantages of prosecuting his action in an English Court if it is otherwise properly brought. The right of access to the King's Court must not be lightly refused. (2.) In order to justify a stay two conditions must be satisfied, one positive and the other negative: (a) the defendant must satisfy the Court that the continuance of the action would work an injustice because it would be oppressive or vexatious to him or would be an abuse of the process of the Court in some other way; and (b) the stay must not cause an injustice to the plaintiff. On both the burden of proof is on the defendant.

16 Thus it appears to me that the inherent power of this court to grant stays can be used to supplement s. 11 of the CCAA when it is just and reasonable to do so. Is it appropriate to do so in the circumstances? Clearly there is jurisdiction under s. 11 of the CCAA to grant a stay in respect of any of the applicants which are all companies which fit the criteria of the CCAA. However the stay requested also involved the limited partnerships to some degree either (i) with respect to the applicants acting on behalf of the Limited Partnerships or (ii) the stays being effective vis-à-vis any proceedings taken by any party against the property assets and undertaking of the Limited Partnerships in respect of which they hold a direct interest (collectively the

"Property") as set out in the terms of the stay provisions of the order paragraphs 4 through 18 inclusive attached as an appendix to these reasons. [Appendix omitted.] I believe that an analysis of the operations of a limited partnership in this context would be beneficial to an understanding of how there is a close inter-relationship to the applicants involved in this CCAA proceedings and how the Limited Partnerships and their Property are an integral part of the operations previously conducted and the proposed restructuring.

17 A limited partnership is a creation of statute, consisting of one or more general partners and one or more limited partners. The limited partnership is an investment vehicle for passive investment by limited partners. It in essence combines the flow through concept of tax depreciation or credits available to "ordinary" partners under general partnership law with limited liability available to shareholders under corporate law. See Ontario LPA sections 2(2) and 3(1) and Lyle R. Hepburn, *Limited Partnerships* , (Toronto: De Boo, 1991), at p. 1-2 and p. 1-12. I would note here that the limited partnership provisions of the Alberta PA are roughly equivalent to those found in the Ontario LPA with the interesting side aspect that the Alberta legislation in s. 75 does allow for judgment against a limited partner to be charged against the limited partner's interest in the limited partnership. A general partner has all the rights and powers and is subject to all the restrictions and liabilities of a partner in a partnership. In particular a general partner is fully liable to each creditor of the business of the limited partnership. The general partner has sole control over the property and business of the limited partnership: see Ontario LPA ss. 8 and 13. Limited partners have no liability to the creditors of the limited partnership's business; the limited partners' financial exposure is limited to their contribution. The limited partners do not have any "independent" ownership rights in the property of the limited partnership. The entitlement of the limited partners is limited to their contribution plus any profits thereon, after satisfaction of claims of the creditors. See Ontario LPA sections 9, 11, 12(1), 13, 15(2) and 24. The process of debtor and creditor relationships associated with the limited partnership's business are between the general partner and the creditors of the business. In the event of the creditors collecting on debt and enforcing security, the creditors can only look to the assets of the limited partnership together with the assets of the general partner including the general partner's interest in the limited partnership. This relationship is recognized under the *Bankruptcy Act* (now the BIA) sections 85 and 142.

18 A general partner is responsible to defend proceedings against the limited partnership in the firm name, so in procedural law and in practical effect, a proceeding against a limited partnership is a proceeding against the general partner. See Ontario *Rules of Civil Procedure* , O. Reg. 560/84, Rules 8.01 and 8.02.

19 It appears that the preponderance of case law supports the contention that contention that a partnership including a limited partnership is not a separate legal entity. See *Lindley on Partnership* , 15th ed. (London: Sweet & Maxwell, 1984), at pp. 33-35; *Seven Mile Dam Contractors v. R.* (1979), 13 B.C.L.R. 137 (S.C.) , affirmed (1980), 25 B.C.L.R. 183 (C.A.) and "Extra-Provincial Liability of the Limited Partner", Brad A. Milne, (1985) 23 Alta. L. Rev. 345, at pp. 350-351. Milne in that article made the following observations:

> The preponderance of case law therefore supports the contention that a limited partnership is not a separate legal entity. It appears, nevertheless, that the distinction made in *Re Thorne* between partnerships and trade unions could not be applied to limited partnerships which, like trade unions, must rely on statute for their validity. The mere fact that limited partnerships owe their existence to the statutory provision is probably not sufficient to endow the limited partnership with the attribute of legal personality as suggested in *Ruzicks* unless it appeared that the Legislature clearly intended that the limited partnership should have a separate legal existence. A review of the various provincial statutes does not reveal any procedural advantages, rights or powers that are fundamentally different from those advantages enjoyed by ordinary partnerships. The legislation does not contain any provision resembling section 15 of the *Canada Business Corporation Act* [S.C. 1974-75, c. 33, as am.] which expressly states that a corporation has the capacity, both in and outside of Canada, of a natural person. It is therefore difficult to imagine that the Legislature intended to create a new category of legal entity.

20 It appears to me that the operations of a limited partnership in the ordinary course are that the limited partners take a completely passive role (they must or they will otherwise lose their limited liability protection which would have been their sole reason for choosing a limited partnership vehicle as opposed to an "ordinary" partnership vehicle). For a lively discussion of the question of "control" in a limited partnership as contrasted with shareholders in a corporation, see R. Flannigan, "The Control Test of Investor Liability in Limited Partnerships" (1983) 21 Alta. L. Rev. 303; E. Apps, "Limited Partnerships and

the 'Control' Prohibition: Assessing the Liability of Limited Partners" (1991) 70 Can. Bar Rev. 611; R. Flannigan, "Limited Partner Liability: A Response" (1992) 71 Can. Bar Rev. 552. The limited partners leave the running of the business to the general partner and in that respect the care, custody and the maintenance of the property, assets and undertaking of the limited partnership in which the limited partners and the general partner hold an interest. The ownership of this limited partnership property, assets and undertaking is an undivided interest which cannot be segregated for the purpose of legal process. It seems to me that there must be afforded a protection of the whole since the applicants' individual interest therein cannot be segregated without in effect dissolving the partnership arrangement. The limited partners have two courses of action to take if they are dissatisfied with the general partner or the operation of the limited partnership as carried on by the general partner — the limited partners can vote to (a) remove the general partner and replace it with another or (b) dissolve the limited partnership. However Flannigan strongly argues that an unfettered right to remove the general partner would attach general liability for the limited partners (and especially as to the question of continued enjoyment of favourable tax deductions) so that it is prudent to provide this as a conditional right: *Control Test* , (1992), supra, at pp. 524-525. Since the applicants are being afforded the protection of a stay of proceedings in respect to allowing them time to advance a reorganization plan and complete it if the plan finds favour, there should be a stay of proceedings (vis-à-vis any action which the limited partners may wish to take as to replacement or dissolution) through the period of allowing the limited partners to vote on the reorganization plan itself.

21 It seems to me that using the inherent jurisdiction of this court to supplement the statutory stay provisions of s. 11 of the CCAA would be appropriate in the circumstances; it would be just and reasonable to do so. The business operations of the applicants are so intertwined with the limited partnerships that it would be impossible for relief as to a stay to be granted to the applicants which would affect their business without at the same time extending that stay to the undivided interests of the limited partners in such. It also appears that the applicants are well on their way to presenting a reorganization plan for consideration and a vote; this is scheduled to happen within the month so there would not appear to be any significant time inconvenience to any person interested in pursuing proceedings. While it is true that the provisions of the CCAA allow for a cramdown of a creditor's claim (as well as an interest of any other person), those who wish to be able to initiate or continue proceedings against the applicants may utilize the comeback clause in the order to persuade the court that it would not be just and reasonable to maintain that particular stay. It seems to me that in such a comeback motion the onus would be upon the applicants to show that in the circumstances it was appropriate to continue the stay.

22 The order is therefore granted as to the relief requested including the proposed stay provisions.

Application allowed.

Footnotes

* As amended by the court.