Court File No: CV-20-00634195-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

BETWEEN:

ORIONIS CORPORATION

Applicant

- and -

ONTARIO GRAPHITE, LTD.

Respondent

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36 AS AMENDED

FACTUM OF THE APPLICANT
(Comeback Hearing; Returnable Feb. 20, 2020)

February 19, 2020

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TO: SERVICE LIST

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Tab 1

PART I – NATURE OF THE MOTION

1. In this motion, the Applicant, Orionis Corporation ("**Orionis**"), seeks:

   (a) an Order (the "**Amended and Restated Initial Order**"),[1] *inter alia*,

      (i) extending the Stay Period, as defined in paragraph 10 of the Initial Order of Justice Gilmore, issued February 12, 2020 (the "**Initial Order**"), until and including April 29, 2020;

      (ii) increasing the authorization of Ontario Graphite, Ltd. ("**OGL**") to borrow under the debtor-in-possession facility (the "**DIP Facility**") described in paragraph 28 of the Initial Order, up to a maximum of US$2.75 million;

      (iii) deeming all references to dollar amounts in the DIP Term Sheet (as defined in paragraph 29 of the Initial Order and attached as Exhibit "E" to the Second Yanovich Affidavit) to mean United States dollars (unless otherwise specified therein); and

      (iv) granting other relief customarily granted in orders made in proceedings under the CCAA;[2]

   (b) an Order (the "**SISP & IRP Approval Order**"),[3] *inter alia*,

      (i) if necessary, abridging the time for service of the Notice of Motion, the Motion Record and this Factum of Orionis and dispensing with any further service thereof;

      (ii) approving the sale and investment solicitation procedures (the "**SISP**"), as described below;

      (iii) granting the Monitor the power to conduct the SISP;

      (iv) approving an incentive and retention plan ("**IRP**") for the benefit of five of OGL's employees (including its sole officer) and one independent contractor to OGL (collectively, the "**IRP Participants**");

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1 Motion Record ("**MR**"), Tab 4.

2 *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 as amended ("**CCAA**").

3 MR, Tab 3.

(v) granting a charge in the amount of $100,000 (the "**IRP Charge**") in favour of the IRP Participants to secure Retention Payments (defined below) potentially owing under the IRP; and

(vi) sealing the Confidential IRP Appendix (defined below).

PART II – FACTS

2. The facts giving rise to this Motion are more thoroughly set out in the Affidavit of Ellerton Castor, sworn February 18, 2020 (the "**Castor Affidavit**"),[4] and the affidavits filed in support of the Initial Order, namely the Affidavit of David Yanovich Wancier, sworn January 10, 2020 (the "**Yanovich Affidavit**")[5] and the Second Affidavit of David Yanovich Wancier, sworn February 11, 2020 (the "**Second Yanovich Affidavit**").[6] Capitalized terms not otherwise defined herein have the meaning ascribed to them in the Initial Order.

A. Background

(i) OGL and the Kearney Mine

3. OGL is a privately-owned Canadian mining company engaged in the re-commissioning and operations of a mining property near Kearney, Ontario (the "**Kearney Mine**").[7] The Kearney Mine was operational from 1989 until its closure in 1994. Since that time, the Kearney Mine has been in care and maintenance.[8]

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4 MR, Tab 2.

5 Application Record, dated Jan. 10, 2020 ("**AR**"), Tab 2.

6 Supplementary Application Record, dated Feb. 11, 2020 ("**Supp AR**"), Tab 2.

7 Yanovich Affidavit at para. 5, 13 [AR, Tab 2, p. 32, 34].

8 Yanovich Affidavit at para. 7, 19-20 [AR, Tab 2, p. 32, 35].

4. Orionis is the principal secured creditor of OGL and has advanced at least US$15 million (inclusive of interest) to OGL, which is secured by all of OGL's assets, undertakings and property (the "**Property**").

(ii) Environmental Issues

5. The Kearney Mine is the subject of a mine closure plan approved by the Ontario Ministry of Energy, Northern Development and Mines in 2012. OGL has contributed approximately $2 million in respect of its obligations under the mine closure plan, which obligations have a total cost of $4.9 million.[9]

6. OGL has been the subject of several environmental orders (including environmental penalty orders) issued by the Ministry of the Environment, Conservation and Parks (the "**MECP**"). In October 2019, OGL (and certain of its current and former officers and directors) entered into a settlement agreement with MECP in respect of a particular environmental order issued by MECP, and simultaneously reached a plea agreement with MECP prosecutors.[10]

7. As a result of the settlement, the MECP issued a new order, which requires OGL to implement an interim plan to treat the pH of the effluent from the Kearney Mine using more effective equipment, provide real-time pH monitoring and weekly pH reporting to the MECP, and undertake dredging of a polishing pond to create more treatment capacity (the

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[9] Yanovich Affidavit at para. 22 [AR, Tab 2, p. 35].

[10] Yanovich Affidavit at para. 25 [AR, Tab 2, p. 36].

"**Interim Plan**"). When the Interim Plan is fully implemented (at an estimated cost of $520,000), OGL will plead guilty to reduced charges for an agreed fine of $75,000.[11]

(iii) Past efforts unsuccessful

8. OGL's efforts to re-open the Kearney Mine have been unsuccessful and, since 2017, OGL and its representatives have engaged in various initiatives, and have been in discussions with various potential investors, with a view to achieving an initial public offering and/or an investment in the business through a private transaction. Orionis has supported these initiatives, including through advancing funds under the Bridge Notes and not enforcing on its security after the first and second Bridge Notes matured. All capital raising and investment solicitation efforts have not culminated in any meaningful interest or any transactions.[12]

9. In the summer and fall of 2019, a final attempt to raise capital through an investment was unsuccessful. That process was funded by Boulevard Asia Trading Limited ("**BATL**"),[13] another of OGL's secured creditors. BATL subsequently advised it was no longer willing to provide further financing.[14]

10. As a result, it became apparent that OGL had exhausted its options and its only way forward was through a Court-supervised proceeding, pursuant to which Orionis was

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11 Yanovich Affidavit at para. 26 [AR, Tab 2, p. 36].

12 Yanovich Affidavit at para. 19-20, 76 [AR, Tab 2, p. 35, 51].

13 Orionis, OGL and BATL are parties to an intercreditor agreement, pursuant to which Orionis and BATL agreed to a ranking of priorities: Yanovich Affidavit at para. 61-64 and Ex. HH [AR, Tab 2, p. 47-48 and Tab 2-HH, p. 588-613].

14 Yanovich Affidavit at para. 77 [AR, Tab 2, p. 51].

prepared to advance funds to finance a SISP, provided such advances were secured with a "super priority" charge against the Property.[15]

B. The Initial Order

11. On February 12, 2020, Justice Gilmore issued the Initial Order pursuant to the CCAA, among other things:

(a) staying proceedings in respect of OGL and the Property until February 22, 2020 (the "**Stay Period**"),

(b) appointing Deloitte Restructuring Inc. as monitor (in such capacity, the "**Monitor**"),

(c) authorizing OGL to borrow from Orionis up to a maximum of $200,000 under the DIP Facility pursuant to the DIP Term Sheet to finance OGL's working capital requirements, costs associated with the implementation of the Interim Plan, other general corporate purposes and post-filing expenses and costs through to the date of this Motion, subject to the terms and conditions of the DIP Term Sheet,

(d) granting the following charges over the Property, in order of priority:

(i) a charge in the amount of $200,000 (the "**Administration Charge**") in favour of the Monitor and its counsel, Orionis's counsel, and OGL's counsel to secure the payment of their respective fees and disbursements incurred in connection with these proceedings,

(ii) a charge (the "**DIP Lender's Charge**") in favour of the DIP Lender to secure all amounts owing under the DIP Facility, and

(iii) a charge in the amount of $200,000 (the "**D&O Charge**") in favour of the directors and officers of OGL as security for the indemnification in favour of those directors and officers for certain

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[15] Yanovich Affidavit at para. 11-12, 76-78, 86-88 [AR, Tab 2, p. 33, 51-52, 54].

obligations and liabilities that they may incur in these proceedings.

C. Subsequent developments

12. Consistent with the Budget (as defined in the Second Yanovich Affidavit), which is attached as Schedule "A" to the DIP Term Sheet, on February 13, 2020, OGL submitted a request to Orionis for an initial advance under the DIP Facility in the amount of US$183,834, and, on February 14, 2020, Orionis made an advance to OGL in that amount (the "**First DIP Advance**").[16]

13. The Initial Order authorized initial advances in an amount of up to Cdn$200,000 until the Comeback Hearing (as defined in paragraph 45 of the Initial Order) (the "**Initial Authorized Borrowings**").[17]

14. Based on the Bank of Canada posted daily average exchange rate for February 14, 2020, the First DIP Advance is equivalent to approximately Cdn$244,000. The First DIP Advance therefore exceeded the Initial Authorized Borrowings by approximately Cdn$44,000 (the "**Initial Advance Excess Amount**").[18]

15. The exceedance was inadvertent. The parties had always intended that both the DIP Term Sheet and the Initial Order would authorize advances of up to US$200,000, which would be increased to US$2.75 million at the Comeback Hearing, as the projected cash flows in the Budget are denominated in United States Dollars. From the outset, the parties

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16 Castor Affidavit at para. 6 [MR, Tab 2, p. 20].

17 Castor Affidavit at para. 7 [MR, Tab 2, p. 20].

18 Castor Affidavit at para. 8 [MR, Tab 2, p. 21].

anticipated that total borrowings of approximately US$2.5 million may be necessary during the pendency of these proceedings.[19]

16. Shortly after the First DIP Advance was made, the parties realized the inconsistency in the currencies referenced in the DIP Term Sheet, the Initial Order, and the Budget. The Monitor was immediately notified of the foregoing and confirmed its understanding that advances under the DIP Facility were to be made in United States Dollars. Nonetheless, OGL has retained, and will continue to retain, the Initial Advance Excess Amount pending the outcome of the Comeback Hearing.[20]

D. SISP

17. The proposed SISP[21] was developed through consultations between OGL, Orionis and the Monitor, all of whom support the SISP.[22]

18. The proposed SISP contemplates a two-phase process that is expected to last to through to June 2020, although such time may be extended if appropriate. During the initial phase, the Monitor will solicit non-binding proposals for the sale of OGL's assets, or an investment in the business, from potential bidders to be submitted by April 15, 2020.[23]

19. To the extent any of the non-binding proposals are acceptable to the Monitor, those bidders will continue to the second phase during which the Monitor will solicit binding

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19 Castor Affidavit at para. 9 [MR, Tab 2, p. 21].

20 Castor Affidavit at para. 10 [MR, Tab 2, p. 21].

21 Motion Record, Tab 3-A.

22 Castor Affidavit at para. 12 [MR, Tab 2, p. 22].

23 First Report of the Monitor ("First Report").

proposals by June 22, 2020. The SISP further contemplates that Orionis may participate in the second phase without submitting a non-binding proposal.[24]

20. To the extent any binding proposals are received, the Monitor will select the best proposal.[25]

E. IRP

21. The proposed IRP was developed following consultations between OGL, Orionis, the IRP Participants and the Monitor.[26]

22. The proposed IRP is intended to provided incentives to keep the IRP Participants in their current positions during the SISP, as each of them has experience with OGL and specialized expertise that would be costly to replace and is essential to completing the SISP and efficiently performing the work contemplated in the Interim Plan.[27]

23. The proposed IRP contemplates retention bonuses for the employee IRP Participants and retention fees for the contractor IRP Participant (collectively, the "**Retention Payments**") up to $100,000, in aggregate. The proposed IRP also contemplates an incentive bonus to the sole officer of OGL upon completion of a sale or investment transaction (a

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24 First Report.

25 First Report.

26 Castor Affidavit at para. 16 [MR, Tab 2, p. 22].

27 Castor Affidavit at para. 17 [MR, Tab 2, p. 22-23].

"**Transaction**") resulting from the SISP (the "**Incentive Payment**"). The Retention Payments and the Incentive Payment are subject to certain terms and conditions.[28]

24. It is proposed that amounts potentially owing in respect of Retention Payments under the IRP be secured by the IRP Charge, which is proposed to rank in priority to the Directors' Charge and subordinate to the Administration Charge and the DIP Lender's Charge. The Incentive Payment is not proposed to be secured by the IRP Charge. Rather, it is intended that it would be paid with the proceeds of any Transaction resulting from the SISP and that such payment would be directed under the Order approving the Transaction.[29]

25. The First Report contains an appendix (the "**Confidential IRP Appendix**") that provides specifics on the Retention Payments and the Incentive Payments.

26. OGL, Orionis and the Monitor support the proposed IRP and IRP Charge.[30]

PART III – ISSUES

27. The following are in issue on this Motion:

(a) whether the SISP & IRP Approval Order should be granted, and in particular:

(i) whether the SISP should be approved,

(ii) whether the IRP and IRP Charge should be approved, and

(iii) whether the Confidential IRP Appendix should be sealed; and

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28 Castor Affidavit at para. 18 [MR, Tab 2, p. 23].

29 Castor Affidavit at para. 19 [MR, Tab 2, p. 23].

30 Castor Affidavit at para. 22 [MR, Tab 2, p. 24].

(b) whether the Amended and Restated Initial Order should be granted, and in particular:

(i) whether the Stay Period should be extended,

(ii) whether OGL should be authorized to borrow up to US$2.75 million under the DIP Facility, and

(iii) whether references to dollar amounts in the DIP Term Sheet should be deemed to be in United States Dollars.

PART IV – LAW AND ARGUMENT

A. The SISP & IRP Approval Order should be granted

(i) The SISP is the only practical way forward

28. The SISP should be approved because there is no better viable alternative and the SISP is the only practical way forward.

29. This Court has held that when considering whether to approve a marketing process, the following questions ought to be considered:

(a) Is a sale warranted at this time?

(b) Will the sale be of benefit to the whole "economic community"?

(c) Do any of the debtors' creditors have a bona fide reason to object to a sale of the business?

(d) Is there a better viable alternative?[31]

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[31] *Nortel Networks Corp., Re*, 2009 CarswellOnt 4467 at para. 49 (Sup. Ct. J. [Commercial List]) ("*Nortel*") [Authorities, Tab 7].

30. In addition to the above criteria, section 36 of the CCAA, which is engaged when determining whether to approve a sale, may be considered indirectly when approving a sales process.[32] Section 36 provides:

> 36(3) In deciding whether to grant the authorization, the court is to consider, among other things,
>
> (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
>
> (b) whether the monitor approved the process leading to the proposed sale or disposition;
>
> (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
>
> (d) the extent to which the creditors were consulted;
>
> (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
>
> (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

31. A court should generally accept a proposed sale process under the CCAA when it has been recommended by the Monitor and is supported by disinterested creditors, absent any compelling, exceptional circumstances to the contrary.[33]

32. OGL has no practical way forward other than through a Court-supervised SISP, as prior investment solicitation processes have failed and OGL can only access additional funding if a SISP is approved.

33. The SISP was prepared in consultation with the Monitor, OGL and Orionis, and each of them supports the SISP.

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32 *Brainhunter Inc., Re*, 2009 CarswellOnt 7627 at para. 14-16 (Sup. Ct. J. [Commercial List]) [Authorities, Tab 2].

33 *Ivaco Inc., Re*, 2004 CarswellOnt 2397 at para. 21 (Sup. Ct. J. [Commercial List]) [Authorities, Tab 6].

34. The timelines in the SISP are appropriate in light of the Monitor's familiarity with the Property, and the Monitor is in the best position to conduct the SISP.

35. Accordingly, the proposed SISP should be approved.

(ii) The IRP satisfies the three-part framework in Aralez

36. The proposed IRP should be approved because it:

(a) was negotiated with participation from arm's length stakeholders;

(b) is necessary to ensure the IRP Participants remain in their current roles for the duration of the CCAA proceedings; and

(c) contemplates payments that are modest, reasonable and properly align the IRP Participants' incentives with the incentives of key stakeholders.

37. In *Aralez*,[34] Justice Dunphy synthesized the jurisprudence on employee retention plans and articulated a three-part framework for evaluating such plans:

> [30] I have conducted my examination of the facts of this case having regard to the following three criteria which I think sweep in all of the considerations underlying *Grant* and *Cinram* and which provide a framework to consider the degree to which appropriately objective business judgment underlies the proposal:
>
> > (a) Arm's length safeguards: The court can justifiably repose significant confidence in the objectivity of the business judgment of parties with a legitimate interest in the matter who are independent of or at arm's length from the beneficiaries of the program. The greater the arm's length input to the design, scope and implementation, the better. Given the obvious conflicts management find themselves in, it is important that the Monitor be actively involved in all phases of the process – from assessing the need and scope to designing the targets and metrics and the rewards. Creditors who may fairly be considered to be the ones

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[34] *Aralez Pharmaceuticals Inc. (Re)*, 2018 ONSC 6980 at para 30 ([Commercial List]) ("*Aralez*") [Authorities, Tab 1].

> indirectly benefitting from the proposed program and indirectly paying for it also provide valuable arm's length vetting input.
>
> (b) Necessity: Incentive programs, be they in the form of KERP or KEIP or some variant are by no means an automatic or matter of course evolution in an insolvency file. They need to be justified on a case-by-case basis on the basis of necessity. Necessity itself must be examined critically. Employees working to help protect their own long-term job security are already well-aligned with creditor interests and might generally be considered as being near one end of the necessity spectrum while those upon whom great responsibility lies but with little realistic chance of having an on-going role in the business are the least aligned with stakeholder interests and thus may generally be viewed as being near the other end of the necessity spectrum when it comes to incentive programs. Employees in a sector that is in demand pose a greater retention risk while employees with relatively easily replaced skills in a well-supplied market pose a lesser degree of risk and thus necessity. Overbroad programs are prone to the criticism of overreaching.
>
> (c) Reasonableness of Design: Incentive programs are meant to align the interests of the beneficiaries with those of the stakeholders and not to reward counter-productive behavior nor provide an incentive to insiders to disrupt the process at the least opportune moment. The targets and incentives created must be reasonably related to the goals pursued and those goals must be of demonstrable benefit to the objects of the restructuring process. Payments made before the desired results are achieved are generally less defensible.

38. The proposed IRP satisfies each of these components.

39. First, both the Monitor and Orionis were involved in the creation of the IRP, and thereby provided the "arm's length vetting" contemplated in *Aralez*. This is not a case where senior management have ignored other stakeholders and sought only to protect their own interests.[35]

40. Second, the IRP (and the IRP Charge) are necessary to ensure the IRP Participants remain in their current roles through the end of the CCAA proceedings. In particular,

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[35] Castor Affidavit at para. 16 and 22 [MR, Tab 2, p. 22, 24].

replacing the IRP Participants is likely to be costly and inconvenient and could jeopardize the timely completion of the SISP.[36]

41. Third, the proposed IRP (and IRP Charge) are reasonable in the circumstances. The Retention Payments are modest and provide appropriate incentives to the IRP Participants to remain in their current positions through the end of the CCAA proceedings.[37]

42. Likewise, the Incentive Payment is modest, especially in light of the thresholds set out in the Confidential IRP Appendix, and properly aligns the CEO's incentives with the interests of the various stakeholders in realizing maximum possible value on the assets.[38] Moreover, both the Monitor and Orionis are supportive of the IRP and IRP Charge.[39]

(iii) The Confidential IRP Appendix should be sealed

43. The Confidential IRP Appendix should be sealed because doing so protects the interests of all stakeholders and the salutary effects outweigh its deleterious effects.

44. Section 137(2) of the *Courts of Justice Act* provides the Court with the discretion to order that any document filed in a civil proceeding can be treated as confidential, sealed, and not form part of the public record. In the insolvency context, courts have granted sealing orders to protect confidential and commercially sensitive documents to protect the interests of various stakeholders, including debtors, provided that:

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36 Castor Affidavit at para. 17 [MR, Tab 2, p. 22-23]; see also First Report and Confidential IRP Appendix.

37 Castor Affidavit at para. 17-19 [MR, Tab 2, p. 22-23]; see also First Report and Confidential IRP Appendix.

38 Castor Affidavit at para. 17-19 [MR, Tab 2, p. 22-23]; see also First Report and Confidential IRP Appendix.

39 Castor Affidavit at para. 22 [MR, Tab 2, p. 24]; see also First Report.

> (a) the order is necessary to prevent a serious risk to an important interest, including a commercial interest, because reasonable alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the order outweigh its deleterious effects, including the effects on the right of free expression, which includes the public interest in open and accessible court proceedings.[40]

45. In *Danier*, this Court granted a sealing order to in respect of detailed information about a key employee retention plan.[41]

46. This case is consistent with *Danier*:

(a) The Confidential IRP Appendix it contains sensitive and personal information about the IRP Participants.

(b) Disclosure of this information is detrimental to the interests of all stakeholders, including OGL, secured creditors and the IRP Participants.

(c) The Castor Affidavit and the First Report provide information about the IRP sufficient to satisfy the public interest in providing access to the matters in dispute and the proposed sealing is limited to truly confidential information.

(d) There are no significant deleterious effects from the sealing of the Confidential IRP Appendix.[42]

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[40] *Danier Leather Inc. (Re)*, 2016 ONSC 1044 at para. 80-82 ([Commercial List]) ("*Danier*") [Authorities, Tab 5], citing *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 SCR 522.

[41] *Ibid* at para. 83, 85-86.

[42] Castor Affidavit at para. 21 [MR, Tab 2, p. 24].

47. Accordingly, the Confidential IRP Appendix should be sealed from the public record.

B. The Amended and Restated Initial Order should be granted

(i) Authorization to borrow under the DIP Facility should be increased

48. In the proposed Amended and Restated Initial Order, Orionis seeks to increase OGL's authorized borrowings under the DIP Facility to US$2.75 million.[43]

49. An increase to the authorized borrowing under the DIP Facility is critical to achieving a successful restructuring through a SISP. OGL will imminently exhaust its remaining resources and has no other source of further financing, having exhausted all options during the prior attempts to solicit potential investments. Critically, in the absence of funding through the DIP Facility, OGL will be unable to satisfy the requirements of the Interim Plan, which will result in OGL incurring further liability in respect of the environmental issues and will jeopardize any chance at achieving an orderly restructuring that maximizes realized value for all stakeholders.[44]

50. Accordingly, an increase in the authorized borrowings under the DIP Facility is reasonable and appropriate in the circumstances.

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[43] Draft Amended and Restated Initial Order at para. 31 [MR, Tab 4, p. 66].

[44] Castor Affidavit at para. 29 [MR, Tab 2, p. 25].

(ii) References to dollar amounts in the DIP Term Sheet should be deemed to mean United States Dollars

51. In the proposed Amended and Restated Initial Order, Orionis seeks a declaration that references to dollar amounts in the DIP Term Sheet mean United States Dollars.[45] The requested declaration should be granted as doing so gives effect to the agreement intended between the parties.

52. In *Fairmont Hotels*, the Supreme Court of Canada confirmed the scope of the Court's equitable relief to rectify contracts:

> [12] If by mistake a legal instrument does not accord with the true agreement it was intended to record — because a term has been omitted, an unwanted term included, or a term incorrectly expresses the parties' agreement — a court may exercise its equitable jurisdiction to rectify the instrument so as to make it accord with the parties' true agreement. Alternatively put, rectification allows a court to achieve correspondence between the parties' agreement and the substance of a legal instrument intended to record that agreement, when there is a discrepancy between the two. Its purpose is to give effect to the parties' true intentions, rather than to an erroneous transcription of those true intentions (Swan and Adamski, at §8.229).[46]

53. The requested declaration falls squarely within the equitable jurisdiction contemplated in *Fairmont Hotels*: the parties' agreement contemplated advances up to a maximum of US$2.75 million, but the DIP Term Sheet erroneously refers to Canadian dollars.[47]

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45 Draft Amended and Restated Initial Order at para. 32 [MR, Tab 4, p. 66].

46 *Canada (Attorney General) v. Fairmont Hotels Inc.*, 2016 SCC 56, [2016] 2 SCR 720 at para. 12 ("*Fairmont Hotels*") [Authorities, Tab 4].

47 Castor Affidavit at para. 9-10, 28 [MR, Tab 2, p. 21, 25].

54. Furthermore, there is no possible prejudice to any other party in granting the requested relief: there can be no doubt that, had the DIP Term Sheet correctly referred to United States Dollars, the Initial Order would still have been granted.

55. In the circumstances, the requested declaration is appropriate and ought to be granted.

(iii) The Stay Period should be extended

56. An extension of the Stay Period is required until and including April 29, 2020, to give OGL 'breathing space' to continue operations and advance the CCAA proceedings, including allowing OGL to continue the work required under the Interim Plan and the Monitor to complete the first phase of the SISP.

57. Pursuant to section 11.02 of the CCAA, the Court may extend the stay of proceedings where: (a) circumstances exist that make the order appropriate; and (b) the debtor company has acted in good faith and with due diligence.

58. In exercising the discretionary authority to grant a stay extension pursuant to the CCAA, the Court must be informed by the purpose behind the CCAA, and the CCAA should be construed broadly in order to achieve the objectives of the CCAA. Among other purposes, the CCAA seeks to maintain the *status quo* for the debtor company for a period while it consults with its stakeholders with a view to continuing operations for the benefit of both the debtor company and its creditors.[48]

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[48] *Stelco Inc., Re*, 2004 CarswellOnt 1211 at para. 15-17 (Sup. Ct. J. [Commercial List]) [Authorities, Tab 8]; *Nortel, supra* note 31 at para. 47 [Authorities, Tab 7].

59. The requested extension to Stay Period is necessary to allow OGL to maintain its operations and satisfy its ongoing requirements under the Interim Plan. Critically, in the absence of an extension to the Stay Period, OGL is at risk of failing to satisfy the requirements in the Interim Plan, to the detriment of all stakeholders.

60. OGL is experiencing liquidity challenges that, without creditor protection, will adversely impact the value of the Property. In particular, the bringing of an application by a creditor in respect of OGL may constitute an event of default under OGL's commercial or other agreements and arrangements, as evidenced by the NOHFC demand, which was received by OGL following issuance of the receivership application in January 2020.[49] An extension to the Stay Period is necessary to prevent the unilateral exercise of creditor remedies, including enforcement proceedings, and to allow the Monitor to undertake the SISP in order to maximize realizable value for OGL's stakeholders.

61. In *Canwest Global*, the Court granted an extension to the Stay Period to allow the debtors to continue working towards a solution that would result in their businesses continuing as a going concern. In support of that decision, the Court considered that: (a) the cash-flow forecast indicated that the debtors had sufficient cash resources to operate throughout the extension of the stay period; (b) the monitor supported the extension; (c) there was a lack of opposition to the motion; and (d) the debtors had acted and were continuing to act in good faith and with due diligence.[50]

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[49] Second Yanovich Affidavit at para. 12 and Ex. B [Supp AR, Tab 2, p. 671 and Tab 2-B, p. 707-712].

[50] *Canwest Global Communications Corp. (Re)*, 2009 CanLII 63368 at para. 43 (Ont. Sup. Ct. J. [Commercial List]) ("*Canwest*") [Authorities, Tab 3].

62. OGL's situation is similar to that in *Canwest* in that: (a) OGL is forecasted to have sufficient liquidity to operate during the proposed Stay Period; (b) the Monitor supports the extension; (c) Orionis, a senior secured creditor, is currently unaware of any opposition to the extension and the extension will advance the interests of all secured creditors as it will afford time for the conduct of the SISP; and (d) OGL has acted and continues to act in good faith and with due diligence.[51]

63. Accordingly, the Stay Period should be extended to and including April 29, 2020.

C. Conclusion

64. For all of the above reasons, the proposed Amended and Restated Initial Order and the proposed SISP & IRP Approval Order are appropriate and reasonable in the circumstances, and therefore should be granted.

PART V – ORDER REQUESTED

65. Orionis requests:

(a) an Amended and Restated Initial Order substantially in the form of the draft at Tab 4 of the Motion Record, and

(b) a SISP & IRP Approval Order substantially in the form of the draft at Tab 3 of the Motion Record.

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[51] Castor Affidavit at paras. 31-35 [MR, Tab 2, p. 25-26].

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

February 19, 2020

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Tab A

SCHEDULE A – LIST OF AUTHORITIES

Tab Case Law

1. *Aralez Pharmaceuticals Inc. (Re)*, 2018 ONSC 6980 ([Commercial List])

2. *Brainhunter Inc., Re*, 2009 CarswellOnt 7627 (Sup. Ct. J. [Commercial List])

3. *Canwest Global Communications Corp. (Re)*, 2009 CanLII 63368 (Ont. Sup. Ct. J. [Commercial List])

4. *Canada (Attorney General) v. Fairmont Hotels Inc.*, 2016 SCC 56, [2016] 2 SCR 720

5. *Danier Leather Inc. (Re)*, 2016 ONSC 1044 ([Commercial List])

6. *Ivaco Inc., Re*, 2004 CarswellOnt 2397 (Sup. Ct. J. [Commercial List])

7. *Nortel Networks Corp., Re*, 2009 CarswellOnt 4467 (Sup. Ct. J. [Commercial List])

8. *Stelco Inc., Re*, 2004 CarswellOnt 1211 (Sup. Ct. J. [Commercial List])

Tab B

SCHEDULE B – RELEVANT STATUTORY PROVISIONS

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

4 Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company, of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

5 Where a compromise or an arrangement is proposed between a debtor company and its secured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

11 Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

[…]

11.001 An order made under section 11 at the same time as an order made under subsection 11.02(1) or during the period referred to in an order made under that subsection with respect to an initial application shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

[…]

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. […]

(3) The court shall not make the order unless

> **(a)** the applicant satisfies the court that circumstances exist that make the order appropriate; and
>
> **(b)** in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

[…]

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.

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

(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.

(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.

(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.

[…]

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.

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

(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.

(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.

[…]

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.

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

[…]

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*.

(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).

[…]

18.6 (1) Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.

(2) If the court is satisfied that an interested person fails to act in good faith, on application by an interested person, the court may make any order that it considers appropriate in the circumstances.

[…]

36.(1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

(2) A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

(3) In deciding whether to grant the authorization, the court is to consider, among other things,

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the monitor approved the process leading to the proposed sale or disposition;

(c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

ORIONIS CORPORATION	and	**ONTARIO GRAPHITE, LTD.**	Court File No: CV-20-00634195-00CL
Applicant		Respondent	

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST
PROCEEDING COMMENCED AT: TORONTO

FACTUM OF THE APPLICANT
(Comeback Hearing; Returnable Feb. 20, 2020)

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Our Matter No. 1165915