Court File No:

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

February 11, 2020

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

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PART I – NATURE OF THE APPLICATION

1. Since 2016, the Applicant, Orionis Corporation ("**Orionis**"), has advanced over US$15 million (inclusive of interest) to Ontario Graphite, Ltd. ("**OGL**") under three secured notes ("**Bridge Notes**") to fund OGL's ongoing operations and various efforts to solicit investments from third parties. As security for the repayment of its obligations under the Bridge Notes, OGL issued to Orionis four demand debentures (the "**Bridge Debentures**"), which secure the property, assets and undertakings of OGL (the "**Property**").

2. All amounts outstanding under the Bridge Notes are due and payable. OGL has defaulted under the terms of the Bridge Notes by failing to pay all outstanding amounts when due. On November 8, 2019, Orionis delivered to OGL a demand for repayment and notice of intention to enforce on security pursuant to section 244 of the *Bankruptcy and Insolvency Act* (the "**BIA**").[1]

3. OGL is unable to continue operations without obtaining additional funding, but no parties are willing to provide further funding outside of a Court-supervised restructuring process. Following consultations with OGL, Orionis has determined that the only realistic path forward is to seek relief under the *Companies' Creditors Arrangement Act* (the "**CCAA**"),[2] with a view to obtaining Court-approval of a sale and/or investment solicitation process ("**SISP**").

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[1] RSC 1985, c B-3.

[2] RSC 1985, c C-36.

4. In this Application, Orionis seeks an order (the "**Initial Order**"),[3] among other things:

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

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

(c) authorizing OGL to borrow from Orionis (in such capacity, the "**DIP Lender**") up to a maximum of $200,000 under a debtor-in-possession facility (the "**DIP Facility**") pursuant to a financing term sheet (the "**DIP Term Sheet**") to finance OGL's working capital requirements, costs associated with the implementation of the Interim Plan (as defined below), other general corporate purposes and post-filing expenses and costs through to the date of the Comeback Hearing (as defined below) (the "**Immediate Funding**"), 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

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[3] Draft Initial Order [Supplementary Application Record ("**Supp. AR**"), Tab 3, p. 744-760].

(e) 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 obligations and liabilities that they may incur in these proceedings.

PART II – FACTS

5. The facts giving rise to this Application are more thoroughly set out in the Affidavit of David Yanovich Wancier, sworn January 10, 2020 (the "**Yanovich Affidavit**") and the Second Affidavit of David Yanovich Wancier, sworn February 11, 2020 (the "**Second Yanovich Affidavit**").[4]

A. Background

(i) Orionis

6. Orionis, a Cayman Islands corporation, is the largest shareholder of Ontario Graphite Ltd. ("**OGL Cayman**"), a Cayman Islands corporation that is the sole shareholder of OGL.[5] As described in greater detail below, Orionis is a major secured creditor of OGL and has security over all of OGL's real and personal property.[6]

(ii) OGL and the Kearney Mine

7. OGL is a privately-owned Canadian mining company engaged in the re-commissioning and operations of a mining property near Kearney, Ontario (the

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[4] Capitalized terms not defined herein have the meaning ascribed to them in the Yanovich Affidavit.

[5] Yanovich Affidavit at para. 15-17 [Application Record ("**AR**"), Tab 2, p. 34].

[6] Yanovich Affidavit at para. 17 [AR, Tab 2, p. 34].

"**Kearney Mine**").[7] The Kearney Mine consists of seven mining leases (the "**Mining Leases**") covering an area of approximately 435 hectares and 116 mining claims (the "**Mining Claims**").[8] The Property is composed almost entirely of the Mining Leases and the Mining Claims, a portion of which OGL owns outright (the "**OGL-Owned Leases**" and "**OGL-Owned Claims**", respectively) and the remainder of which OGL beneficially owns.[9]

8. The Kearney Mine was operational from 1989 until its closure in 1994. Since that time, the Kearney Mine has been in care and maintenance.[10]

9. Since at least September 2015, OGL has been suffering from operational and liquidity issues. During this time, Orionis has worked collaboratively with OGL and in particular has financed prior investment solicitation efforts, which efforts did not result in any transactions.[11]

B. OGL's secured indebtedness to Orionis

10. OGL has indebtedness in excess of C$26 million.[12]

11. Orionis is the principal secured creditor of OGL and has advanced at least US$15 million (inclusive of interest) to OGL pursuant to the Bridge Notes, dated

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

8 Yanovich Affidavit at para. 18 [AR, Tab 2, p. 34].

9 Yanovich Affidavit at para. 33-34 and Ex. D [AR, Tab 2, p. 38-39 and Tab 2-D, p. 111-117].

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

11 Yanovich Affidavit at para. 8, 76 [AR, Tab 2, p. 32, 51].

12 Yanovich Affidavit at para. 9 [AR, Tab 2, p. 32].

January 10, 2016, July 19, 2017, and March 20, 2019.[13] As security for repayment of its obligations under the Bridge Notes, OGL issued to Orionis the Bridge Debentures, dated January 19, 2016, July 19, 2017, and two dated March 20, 2019, which secure the Property.[14] In particular:

(a) Orionis registered the Bridge Debentures pursuant to the *Mining Act* against title to the OGL-Owned Claims;[15]

(b) Orionis registered a charge in respect of the Bridge Debentures pursuant to the *Land Titles Act* against title to the OGL-Owned Leases;[16]

(c) Orionis registered a financing statement pursuant to the *Personal Property Security Act* (Ontario) against OGL over collateral classifications of inventory, equipment, accounts, other, and motor vehicles.[17]

12. OGL's obligations under the first and second Bridge Notes have matured and its obligations under the third Bridge Note are demand obligations. Orionis issued a

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[13] Yanovich Affidavit at para. 9, 36-37, 44-45, 52-53 and Ex. G-L, Q-W, EE [AR, Tab 2, p. 32, 40, 43-45 and Tabs 2-G-2-L, 2-Q-2-W, 2-EE, p. 130-238, 334-437, 516-555].

[14] Yanovich Affidavit at para. 39, 47-49, 54 and Ex. M, X-DD, FF [AR, Tab 2, p. 40-41, 43-45 and Tabs 2-M, 2-X-2-DD, 2-FF, p. 239-261, 438-515, 556-585].

[15] Yanovich Affidavit at para. 41, 50, 55-56 [AR, Tab 2, p. 41, 44, 46].

[16] Yanovich Affidavit at para. 42, 51 and Ex. E [AR, Tab 2, p. 42, 44-46 and Tab 2-E, p. 118-124].

[17] Yanovich Affidavit at para. 40 and Ex. N [AR, Tab 2, p. 41 and Tab 2-N, p. 262-303].

demand for repayment and notice of intention to enforce on security pursuant to section 244 of the BIA.[18]

C. Environmental Issues

13. 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.[19]

14. 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.[20]

15. 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 "**Interim Plan**"). When the Interim Plan is fully implemented

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[18] Yanovich Affidavit at para. 12, 58-60 and Ex. A [AR, Tab 2, p. 33, 46-47 and Tab 2-A, p. 56-74].

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

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

(at an estimated cost of $520,000), OGL will plead guilty to reduced charges for an agreed fine of $75,000.[21]

D. Past efforts unsuccessful

16. 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.[22]

E. Need for CCAA protection

17. 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**"),[23] another of OGL's secured creditors. BATL subsequently advised it was no longer willing to provide further financing.[24]

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

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

[23] 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].

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

18. 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 prepared to advance funds to finance a SISP, provided such advances were secured with a "super priority" charge against the Property.[25]

19. Orionis initially commenced these proceedings with the intention of obtaining a receivership order appointing Deloitte as receiver of the Property. However, as a result of the environmental issues, a receivership was not viable.[26]

20. The delay in obtaining a receivership order has left OGL in desperate need of additional financing in respect of the Immediate Funding, failing which it will cease operations, jeopardizing completion of the Interim Plan.[27]

21. Orionis subsequently determined that the only practical way forward was through commencing CCAA proceedings, with the support of OGL and its senior management.[28] It is contemplated that approval of a SISP and certain other relief will be sought at a hearing to be heard no more than 10 days after obtaining the Initial Order (the "**Comeback Hearing**").[29]

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

[26] Second Yanovich Affidavit at para. 1-2, 8-11 [Supp. AR, Tab 2, p. 666-667, 670-671].

[27] Second Yanovich Affidavit at para. 14-16 [Supp. AR, Tab 2, p. 671-672].

[28] Second Yanovich Affidavit at para. 17 [Supp. AR, Tab 2, p. 672].

[29] Second Yanovich Affidavit at para. 6-7, 34-46 [Supp. AR, Tab 2, p. 669-670, 675-677].

PART III – ISSUES

22. The following are in issue on this Application:

(a) whether OGL meets the criteria for protection under the CCAA, and in particular:

(i) whether OGL is a "debtor company" as defined in the CCAA; and,

(ii) whether the total claims against OGL exceed C$5 million;

(b) whether Orionis has standing to commence these CCAA proceedings;

(c) whether the proposed Initial Order is reasonably necessary and in particular:

(i) whether the proposed Stay should be granted;

(ii) whether Deloitte should be appointed Monitor;

(iii) whether the proposed Administration Charge should be granted;

(iv) whether the proposed DIP Facility and DIP Term Sheet should be approved and the proposed DIP Lender's Charge should be granted; and,

(v) whether the D&O Charge should be granted.

PART IV – LAW AND ARGUMENT

A. The CCAA applies to OGL

23. The CCAA applies to "debtor company" where the total of claims against the debtor exceeds five million dollars.[30] OGL satisfies both requirements.

[30] CCAA, s. 3(1).

(i) OGL is a "debtor company"

24. Under section 2 of the CCAA, a "debtor company" includes a company[31] that is insolvent. Although "insolvent" is not defined in the CCAA, courts have held that a company is insolvent for purposes of the CCAA if it satisfies

(a) any one of tests in the definition of "insolvent person" in the BIA,[32] or

(b) the "expanded" definition of an insolvent person articulated by Justice Farley in *Stelco*, which, recognizing the "rescue" objectives underlying the CCAA, includes a financially troubled corporation that is "reasonably expected to run out of liquidity within reasonable proximity of time as compared with the time reasonably required to implement a restructuring."[33]

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[31] "Company" is defined in section 2 to include a corporation incorporated under an Act of the legislature of a province.

[32] Under the BIA, an "insolvent person" means a person who is not bankrupt and who resides, carries on business or has property in Canada, and whose liability to creditors provable as claims under this Act amount to one thousand dollars, and

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

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

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

[33] *Stelco Inc., Re*, [2004] O.J. No. 1257 at para. 21-22, 26 and 28 (Sup. Ct. J. [Commercial List]) ("***Stelco***") [Book of Authorities of Orionis ("**Authorities**"), Tab 6].

25. OGL satisfies at least two of those tests: OGL in unable to meet its obligations as they generally become due and it is expected to run out of liquidity in a matter of days.[34]

(ii) OGL has over C$5 million in liabilities

26. OGL's current outstanding liabilities are in excess of C$26 million,[35] well in excess of the threshold in the CCAA.

27. Accordingly, the CCAA applies to OGL.

B. Orionis has standing to bring an application for an Initial Order

28. The CCAA expressly provides standing to creditors to commence proceedings against a debtor company.[36] Accordingly, as a senior secured creditor of OGL, Orionis has standing to commence proceedings under the CCAA in respect of OGL.

C. The proposed Initial Order is reasonably necessary for the continued operation of OGL during the Initial Stay Period

29. Section 11.001, which was enacted concurrent with the recent amendment to section 11.02 reducing the maximum initial stay period from 30 days to 10 days, provides as follows:

> 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

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[34] Yanovich Affidavit at para. 58-60 [AR, Tab 2, p. 46-47]; Second Yanovich Affidavit at para. 12-16 [Supp. AR, Tab 2, p. 671-672].

[35] Yanovich Affidavit at para. 9 [AR, Tab 2, p. 32].

[36] CCAA, ss. 4-5; *ATB Financial et al. v. Apollo Trust et al.*, 2008 CanLII 21724, 45 BLR (4th) 201 (Ont. Sup. Ct. J.) [Commercial List] [Authorities, Tab 1]; *Miniso International Hong Kong Limited v Migu Investments Inc.*, 2019 BCSC 1234 at para. 45 [Authorities, Tab 5].

> course of business during that period.

30. In *Lydian*, Morawetz C.J. held that section 11.001 applies absent exceptional circumstances:

> In my view, the intent of s. 11.001 is clear. Absent exceptional circumstances, the relief to be granted in the initial hearing "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". The period being no more than 10 days, and whenever possible, the status quo should be maintained during that period.[37]

31. Accordingly, Orionis must demonstrate[38] that the relief sought is "reasonably necessary" for the continued operations of OGL in the ordinary course of business during the Initial Stay Period.

32. As set out in more detail below, the relief sought in the proposed Initial Order is reasonably necessary for the continued operations of OGL in the ordinary course of its business during the Initial Stay Period.

(i) An Initial Order granting a Stay is appropriate

33. Pursuant to subsection 11.02(1) of the CCAA, the Court has discretion to make an order staying proceedings for a period of not more than 10 days, provided that the Court is satisfied that the such an order is appropriate in the circumstances.

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[37] *Lydian International Limited (Re)*, 2019 ONSC 7473 at para. 26 [Commercial List] [Authorities, Tab 4].

[38] CCAA, s. 11.02(3).

34. In exercising the discretionary authority to grant a stay 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.

35. 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.[39]

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

37. 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.[40] The Stay is necessary to prevent the unilateral exercise of creditor remedies, including enforcement proceedings, to allow the proposed Monitor to undertake the SISP in order to maximize realizable value for OGL's stakeholders.

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[39] *Stelco* at para. 15-17 [Authorities, Tab 6].

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

38. Accordingly, the proposed Stay in favour of OGL is appropriate in the circumstances and consistent with the objectives of the CCAA.

(ii) Deloitte should be appointed as Monitor

39. In the proposed Initial Order, Orionis seeks the appointment of Deloitte as Monitor of OGL's business.[41]

40. Upon the granting of an initial order, subsection 11.7(1) of the CCAA requires the Court to appoint a person to monitor the business and financial affairs of the debtor company.

41. Deloitte:

(a) has consented to act as Monitor in these CCAA proceedings,

(b) is a trustee within the meaning of subsection 2(1) of the BIA, and

(c) is not subject to any of the restrictions as to who may be appointed as monitor set out in subsection 11.7(2).[42]

42. Further, Deloitte has relevant experience marketing and selling mining properties, and will be able to leverage market intelligence acquired during prior capital raising processes to streamline and expeditated any process for the solicitation of bids from potential purchasers or strategic investors.[43]

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[41] Draft Initial Order at para. 19-27 [Supp. AR, Tab 3, p. 750-753].

[42] Yanovich Affidavit at para. 78 [AR, Tab 2, p. 52]; Second Yanovich Affidavit at para. 19 and Ex. D [Supp. AR, Tab 2, p. 672 and Tab 2-D, p. 720-722].

[43] Yanovich Affidavit at para. 78-79 [AR, Tab 2, p. 52].

43. Accordingly, Deloitte should be appointed as Monitor in the CCAA proceedings.

(iii) The Administration Charge is reasonably necessary

44. In the proposed Initial Order, Orionis seeks approval of the Administration Charge in the maximum amount of $200,000 in favour of the Monitor, the Monitor's counsel, Orionis's counsel and OGL's counsel to secure their respective fees and disbursements incurred in connection with these CCAA proceedings. The Administration Charge is proposed to rank in priority to all charges created in the Initial Order and all other security interests.[44]

45. Pursuant to section 11.52 of the CCAA, the Court has specific authority to grant a "super priority" charge to the directors and officers of a company as security for indemnity provided by the company in respect of certain statutory obligations.

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

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[44] Draft Initial Order at para. 27 and 34 [Supp. AR, Tab 3, p. 753, 755].

> **11.52(2)** ***Priority*** — This court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

46. In *Canwest Publishing*, Pepall J. (as she then was) identified six non-exhaustive factors that the Court may consider when determining whether to grant an administration charge:

> (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.[45]

47. The proposed Administration Charge is appropriate in light of the factors relevant in this case, namely:

(a) the quantum of the proposed Administration Charge, which is relatively low, is commensurate with the level of involvement required of the professional advisors subject to the Administration Charge in light of the environmental issues discussed above and the need to prepare a SISP for approval at the Comeback Hearing;

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[45] *Canwest Publishing Inc., Re*, 2010 ONSC 222 at para. 54 [Commercial List] ("***Canwest Publishing***") [Commercial List Common Authorities Book, Tab 8].

(b) the beneficiaries of the Administration Charge will provide essential legal and financial advice throughout the CCAA proceedings, including during the Initial Stay Period;

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

(d) secured creditors likely to be impacted by the Administration Charge (including the beneficiaries of the proposed D&O Charge, were provided with notice of the commencement of the CCAA proceedings; and

(e) Deloitte supports the proposed Administration Charge.[46]

(iv) The DIP Facility and DIP Lender's Charge are reasonably necessary

48. In the proposed Initial Order, Orionis seeks approval of the DIP Facility and a DIP Lender's Charge as security in respect of all amounts owing thereunder, and authorization of borrowing under the DIP Facility in respect of the Immediate Funding. The DIP Lender's Charge is proposed to rank immediately behind the Administration Charge, but in priority to all other charges created in the Initial Order and all other security interests.[47]

49. Section 11.2 of the CCAA gives the Court the express statutory authority to grant a debtor-in-possession ("**DIP**") financing charge:

> **11.2(1)** ***Interim Financing*** – 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

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46 Pre-Filing Report of the Proposed Monitor, Deloitte Restructuring Inc.

47 Draft Initial Order at para. 28-34 [Supp. AR, Tab 3, p. 753-755].

> 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.
>
> **11.2(2)** ***Priority – Secured Creditors*** – The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

50. Section 11.2(4) of the CCAA sets out the following factors to be considered by the Court in deciding whether to grant a DIP financing charge:

> **11.2(4)** ***Factors to be considered*** **–** 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 the CCAA;
> >
> > (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.

51. Section 11.2 of the CCAA was intended to prevent pre-filing lenders from obtaining enhanced priority for any pre-existing loans to the debtor or to prevent a super priority DIP charge from securing otherwise unsecured obligations.[48]

52. This not a concern in the present case, as it is not contemplated that Orionis will receive ***any*** payments in respect of the amounts under the Bridge Notes with the proceeds from the DIP Facility, nor will the DIP Facility be used to pay any other (material) pre-filing liabilities, subject to further order of the Court. To the contrary, pursuant to the budget incorporated into the DIP Term Sheet (the "**Budget**"), the proceeds of the DIP Facility are to be used exclusively for the ongoing operations of OGL, including the works required under the Interim Plan, and, subject to obtaining a further order at the Comeback Hearing, to fund the SISP. Thus, no other secured creditor will be materially prejudiced. Rather, the proceeds of the DIP Facility are intended to be used, in part, to preserve the value of the Property, thereby preserving the value of the security that may be held by other secured creditors of OGL.[49]

53. The terms of the proposed DIP Term Sheet are reasonable in the circumstances, including that access to the DIP Facility is conditional upon adherence to the agreed upon Budget, subject to a 10% cumulative variance agreed by the parties.[50]

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[48] The Standing Senate Committee on Banking, Trade and Commerce, "Seventeenth Report: Bill C-55, without amendment but with observations" (24 November 2005) tabled in the 38th Parliament, 1st Session [Authorities, Tab 7].

[49] Second Yanovich Affidavit at para. 23-24 and Ex. E [Supp. AR, Tab 2, p. 673-674 and Tab 2-E, p. 723-742]

[50] Second Yanovich Affidavit at para. 23 [Supp. AR, Tab 2, p. 673].

54. 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.[51]

55. Finally, the relief requested in the proposed Initial Order is limited to that necessary during the Initial Stay Period, namely financing the Immediate Funding, and therefore satisfies new subsection 11.2(5):

> **11.2(5)** ***Additional factor – initial application*** – 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.

56. Accordingly, the requested relief in respect of the DIP Facility, include the DIP Lender's Charge, is reasonably necessary and appropriate in the circumstances.

(v) The D&O Charge is reasonably necessary

57. Orionis seeks a D&O Charge in an amount of up to $200,000 to act as security for indemnification obligations for OGL's directors and officers from the risk of personal exposure that they may incur as directors or officers of OGL after the

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[51] Second Yanovich Affidavit at para. 14-16 and 47 [Supp. AR, Tab 2, p. 671-672, 678].

commencement of these CCAA proceedings. The D&O Charge is proposed to rank immediately behind the Administration Charge and the DIP Lender's Charge, but in priority to all other security interests.[52]

58. Pursuant to section 11.51 of the CCAA, the Court has specific authority to grant a "super priority" charge to the directors and officers of a company as security for indemnity provided by the company in respect of certain statutory obligations.

> **11.51(1)** ***Security or charge relating to director's indemnification*** — On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.
>
> **11.51(2)** ***Priority*** — The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
>
> **11.51(3)** ***Restriction*** — indemnification insurance — The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.
>
> **11.51(4)** ***Negligence, misconduct or fault*** — The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

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[52] Draft Initial Order at para. 16-18 and 34 [Supp. AR, Tab 3, p. 749-750]

59. In *Canwest Global,* Pepall J. set out some of the factors to be considered by the court when applying s. 11.51. In approving the requested directors' charge, Pepall J. stated:

> The purpose of such a charge is to keep the directors and officers in place during the restructuring by providing them with protections against liabilities they could incur during the restructuring: *Re General Publishing Co.* [(2003), 39 C.B.R. (4th) 216)]. Retaining the current directors and officers of the applicants would avoid destabilization and would assist in the restructuring. The proposed charge would enable the applicants to keep the experienced board of directors supported by experienced senior management. The proposed Monitor believes that the charge is required and reasonable in the circumstances and also observes that it will not cover all of the directors' and officers' liabilities in the worst case scenario. In all of these circumstances, I approved the request.[53]

60. In *Jaguar Mining Inc.*, Morawetz RSJ (as he then was) stated that, in order to grant a directors and officers' charge, the Court must be satisfied of the following factors:

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

(b) the amount is appropriate;

(c) the applicant could not obtain adequate indemnification insurance for the director at a reasonable cost; and

(d) the charge does not apply in respect of any obligation incurred by a director as a result of the director's gross negligence or wilful misconduct.[54]

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[53] *Canwest Global Communications Corp., Re*, 2009 CanLII 55114, 59 CBR (5th) 72 at para. 48 (Sup. Ct. J. [Commercial List]) ("***Canwest Global***") [Authorities, Tab 2].

[54] *Jaguar Mining Inc., Re*, 2014 ONSC 494 at para. 45 [Commercial List] ("***Jaguar Mining Inc.***"). [Authorities, Tab 3]

61. The proposed D&O Charge satisfies guidance in *Canwest Global* and the requirements set out in *Jaguar Mining Inc.*:

(a) Orionis has given notice to the other secured creditors likely to be affected by the D&O Charge;

(b) Deloitte supports the D&O Charge;

(c) it is unknown to Orionis the extent to which the directors and officers of OGL are covered by directors' and officers' insurance policies;

(d) the proposed indemnity (and therefore the proposed D&O Charge) expressly excludes liability incurred as a result of gross negligence or wilful misconduct; and,

(e) the proposed D&O Charge is necessary to secure the ongoing participation of the directors' and officers' of OGL, which participation is essential to preserving the value of the Property.[55]

(vi) Conclusion

62. For all of the above reasons, the proposed Initial Order is appropriate and reasonably necessary in the circumstances.

PART IV – ORDER REQUESTED

63. Orionis requests an Initial Order substantially in the form of the draft Initial Order at Tab 3 of the Supplementary Application Record.

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[55] Second Yanovich Affidavit at para. 27-33 [Supp. AR, Tab 2, p. 674-675]

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

February 11, 2020

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SCHEDULE A - LIST OF AUTHORITIES

<u>Tab Case Law</u>

1. *ATB Financial et al. v. Apollo Trust et al.*, 2008 CanLII 21724, 45 BLR (4th) 201 (Ont. Sup. Ct. J. [Commercial List])

2. *Canwest Global Communications Corp., Re,* 2009 CanLII 55114, 59 CBR (5th) 72 at para. 48 (Sup. Ct. J. [Commercial List])

3. *Jaguar Mining Inc., Re*, 2014 ONSC 494 [Commercial List]

4. *Lydian International Limited (Re)*, 2019 ONSC 7473 [Commercial List]

5. *Miniso International Hong Kong Limited v Migu Investments Inc.*, 2019 BCSC 1234

6. *Stelco Inc., Re,* [2004] O.J. No. 1257 (Sup. Ct. J. [Commercial List])

<u>Tab Secondary Sources</u>

7. The Standing Senate Committee on Banking, Trade and Commerce, "Seventeenth Report: Bill C-55, without amendment but with observations" (24 November 2005) tabled in the 38th Parliament, 1st Session

SCHEDULE B – RELEVANT STATUTORY PROVISIONS

***Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended**

2. […]

"insolvent person" « personne insolvable »

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

> (a) who is for any reason unable to meet his obligations as they generally become due,
>
> (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
>
> (c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due;

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

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)

[…]

"**secured creditor**" means a holder of a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, all or any property of a debtor company as security for indebtedness of the debtor company, or a holder of any bond of a debtor company secured by a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, or a trust in respect of, all or any property of the debtor company, whether the holder or beneficiary is resident or domiciled within or outside Canada, and a trustee under any trust deed or other instrument securing any of those bonds shall be deemed to be a secured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds; (créancier garanti)

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.

[…]

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.

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

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