

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF TEHAMA INC.

FACTUM OF THE APPLICANT

(Returnable January 30, 2023)

January 27, 2023

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PART I – OVERVIEW

1. On January 20, 2023, Tehama Inc. (the “**Company**”) sought and obtained an order (the “**Initial Order**”) under the *Companies’ Creditors Arrangement Act*, RSC 1985, c C-36 (the “**CCAA**”).

2. The relief granted under the Initial Order was limited to what the Company reasonably required during the initial 10-day stay period, which included, among other things:
 - (a) appointing Deloitte Restructuring Inc., as monitor in these proceedings (the “**Monitor**”);
 - (b) granting an administration charge (“**Administration Charge**”) in the amount of \$200,000 in favour of counsel to the Company, the Monitor and the Monitor’s counsel;
 - (c) approving the DIP Facility, authorizing borrowings under the DIP Commitment in an amount up to \$300,000, and granting the DIP Lender’s Charge (each term as defined below);
 - (d) granting a directors’ charge (the “**Directors’ Charge**”) in favour of the Company’s directors and officers in the amount of \$225,000; and
 - (e) granting a stay of proceedings (the “**Stay of Proceedings**”) up to and including January 30, 2023 (the “**Initial Stay Period**”).

3. In advance of the expiry of the Initial Stay Period, the Company requires extended and additional relief in order to advance its restructuring efforts. Accordingly, the Company files this

factum in support of its motion for an amended and restated Initial Order (“**ARIO**”), among other things:

- (a) abridging the time for and validating service of this Notice of Motion and the Motion Record and dispensing with further service thereof;
- (b) extending the Initial Stay Period to and including March 31, 2023 (as extended, the “**Stay Period**”);
- (c) increasing the Administration Charge to \$300,000; and
- (d) increasing the DIP Lender’s Charge to \$500,000.

4. The Company submits that the relief requested is necessary to ensure the Company’s continued operations and is in the interest of its stakeholders. The relief is also supported by the Monitor.

PART II – FACTS

5. The facts relevant to this proceeding are fully set out in the affidavits of Rob White sworn January 20, 2023 (the “**First White Affidavit**”)¹ and January 26, 2023 (the “**Second White Affidavit**”).² All capitalized terms used but not otherwise defined herein have the meanings given to them in the First White Affidavit or Second White Affidavit, as applicable.

¹ First White Affidavit, the Company’s Motion Record dated January 26, 2023 (the “**Motion Record**”), Tab 2A.

² Second White Affidavit, Motion Record, Tab 2.

A. Overview of the Company’s Business and Need for CCAA Relief

6. The Company is in the business of providing a next-generation “desktop as a service” (DaaS) platform which enables customers to utilize cloud-based virtual offices, room and desktops from anywhere in the world. The Company’s services are often used in the context of critical services delivery, including services to support IT infrastructure. Although the Company is currently facing a liquidity crisis, with the benefit of the protections afforded by the CCAA, the Company will be able to maintain its value, preserve jobs for its employees, and generally stabilize its business operations for the benefit of all the Company’s stakeholders.³

7. Following months of liquidity challenges, the Company recently faced a severe liquidity crisis, had limited cash on hand, and was generally unable to meet its obligations as they became due. After exploring various strategic alternatives, the Company’s board of directors determined to seek urgent relief under the CCAA. Accordingly, on January 20, 2023, the Company sought and obtained the Initial Order.⁴

B. The Company’s Activities Since the Initial Order was Granted

8. Since the granting of the Initial Order, the Company has, with the assistance and oversight of the Monitor, acted in good faith and with due diligence to, among other things:

- (a) stabilize and continue the Company’s business and ordinary course operations;

³ Second White Affidavit, at para. 6, Motion Record, Tab 2.

⁴ Second White Affidavit, at para. 7, Motion Record, Tab 2.

- (b) communicate with key stakeholders regarding the CCAA proceedings and the granting of the Initial Order;
- (c) assist the Monitor in preparing notices to creditors and other stakeholders as required under the Initial Order;
- (d) submit an advance request certificate to the DIP Lender to borrow under the DIP Facility in accordance with the DIP Commitment;
- (e) together with the Monitor, develop a sale and investment solicitation process (“SISP”), which includes a proposed stalking horse purchase agreement (the “**Stalking Horse APA**”); and
- (f) prepare materials in support of this motion (the “**Comeback Hearing**”).⁵

9. The Company now seeks additional relief intended to advance the purposes of these CCAA proceedings and facilitate the Company’s restructuring efforts, including the implementation of the SISP.⁶

C. The Stay of Proceedings

10. The initial Stay Period will expire on January 30, 2023. At the Comeback Hearing, the Company seeks an extension of the Stay Period up to and including March 31, 2023.⁷ Since the granting of the Initial Order, the Company has acted, and continues to act, in good faith and with due diligence. The extension of the Stay of Proceedings will preserve the *status quo* and afford

⁵ Second White Affidavit, at para. 10, Motion Record, Tab 2.

⁶ Second White Affidavit, at para. 11, Motion Record, Tab 2.

⁷ Second White Affidavit, at para. 13, Motion Record, Tab 2.

the Company the breathing room and stability required to advance its restructuring efforts, including the finalization and implementation of the SISP.⁸

11. The Cash Flow Forecast demonstrates that the Company will have sufficient cash to support its ordinary course business operations and the costs of these CCAA proceedings throughout the proposed extension to the Stay Period, provided the ARIO is granted.⁹

12. In addition, the proposed extension of the Stay Period would extend through the term of the anticipated SISP, which is expected to run through to March 31, 2023, subject to Court approval at a subsequent motion.¹⁰

D. The Administration Charge

13. Pursuant to the Initial Order, the Court granted the Administration Charge in the amount of \$200,000 in favour of counsel to the Company, the Monitor and the Monitor's counsel.¹¹

14. The quantum of the Administration Charge under the Initial Order was determined in consultation with the Monitor and was limited to the amount to required in the immediate lead-up to and first 10 days following the granting of the Initial Order.¹²

15. The Company proposes to increase the Administration Charge to \$300,000. The quantum of the increase is reasonably necessary at this time to secure the fees and disbursements

⁸ Second White Affidavit, at para. 14, Motion Record, Tab 2.

⁹ Second White Affidavit, at para. 16, Motion Record, Tab 2.

¹⁰ Second White Affidavit, at para. 17, Motion Record, Tab 2.

¹¹ Second White Affidavit, at para. 20, Motion Record, Tab 2.

¹² Second White Affidavit, at para. 21, Motion Record, Tab 2.

of the professionals who continue to contribute to these CCAA proceedings and assist the Company with its restructuring efforts and continuing its business in the ordinary course.¹³

E. The DIP Lender's Charge

16. Pursuant to a term sheet dated January 19, 2023 (the "**DIP Commitment**"), 14667913 Canada Inc. (the "**DIP Lender**") agreed to provide a debtor in possession facility ("**DIP Facility**") to the Company in the maximum principal amount of \$500,000.¹⁴

17. Pursuant to the Initial Order, the DIP Lender was granted a charge on the Property (as defined in the Initial Order) in the maximum amount of \$300,000 to secure all amounts advanced under the DIP Facility. The quantum of the DIP Lender's Charge under the Initial Order was limited to the amount necessary to ensure the continued operations of the Company prior to the Comeback Hearing.¹⁵

18. Having regard to the Cash Flow Forecast and the Company's funding requirements during the Stay Period, the Company proposes to increase the amount of the DIP Lender's Charge to \$500,000, which is commensurate with the maximum borrowings available under the DIP Facility and the Company's needs during the extended Stay Period.¹⁶

19. If the DIP Lender's Charge is not increased, the Company will not be permitted to request the additional advances under the DIP Facility necessary to maintain the Company's ordinary course operations or to fund these CCAA proceedings during the Stay Period.

¹³ Second White Affidavit, at para. 22, Motion Record, Tab 2.

¹⁴ Second White Affidavit, at paras. 23-24, Motion Record, Tab 2.

¹⁵ Second White Affidavit, at paras. 25-26, Motion Record, Tab 2.

¹⁶ Second White Affidavit, at para. 27, Motion Record, Tab 2.

Accordingly, absent the proposed increase to the DIP Lender's Charge, the Company will be forced to cease its ongoing operations.¹⁷

20. The Monitor has advised that it is supportive of the proposed increase to the DIP Lender's Charge and that such increase is in the best interests of the Company and its stakeholders in the circumstances.¹⁸

PART III – ISSUES

21. The issues before this Honourable Court are whether this Court should:

- (a) extend the Stay of Proceedings granted under the Initial Order through the Stay Period;
- (b) increase the amount of the Administration Charge; and
- (c) increase the amount of the DIP Lender's Charge.

PART IV – LAW AND ARGUMENT

A. Extending the Stay of Proceedings

22. The Stay of Proceedings is currently set to expire on January 30, 2023. Subsection [11.02\(2\)](#) of the CCAA expressly authorizes the Court to grant an extension of the Stay of Proceedings for “any period the court considers necessary”.¹⁹ To grant such an extension, the

¹⁷ Second White Affidavit, at para. 28, Motion Record, Tab 2.

¹⁸ Second White Affidavit, at para. 29, Motion Record, Tab 2; First Report of the Monitor dated January 26, 2023 (“**Monitor's First Report**”), at para. 27.

¹⁹ CCAA, s. [11.02\(2\)](#).

Court must be satisfied that circumstances exist that make the order appropriate and that the Company has acted, and is acting, in good faith and with due diligence.²⁰

23. The jurisdiction vested in Courts to stay proceedings under section [11.02](#) “should be construed broadly to accomplish the legislative purposes of the CCAA”.²¹ These purposes include, among others, enabling the continuation of the applicant’s business, avoiding the social and economic costs of a liquidation and facilitating a value-maximizing restructuring.²⁵ Accordingly, a stay of proceedings will be appropriate where it maintains the *status quo* and provides applicant with breathing room while it seeks to restore solvency and arrange a sale of assets in order to maximize recovery for stakeholders.²²

24. In the present case, the proposed extension of the Stay of Proceedings through the Stay Period is appropriate in the circumstances given that:

- (a) since the granting of the Initial Order, the Company has acted in good faith and with due diligence to stabilize and continue the Company’s ordinary course operations, and advance its restructuring objectives, including by, among other things, liaising with its stakeholders and continuing to develop a SISP;
- (b) the Stay of Proceedings is necessary to prevent enforcement action by the Company’s contractual counterparties;
- (c) the proposed extension of the Stay of Proceedings will preserve the *status quo* and afford the Company the breathing space and stability required to continue its ordinary

²⁰ *Laurentian University of Sudbury*, 2021 ONSC 1098 at para. [56](#).

²¹ *Canwest Global Communications Corp.*, 2011 ONSC 2215 at para [24](#).

²² *Target Canada Co*, 2015 ONSC 303 at para. [8](#); *Re Timminco Limited*, 2012 ONSC 2515 at para. [15](#).

course operations, preserving value for the Company's stakeholders, including its employees and service suppliers;

- (d) the proposed extension of the Stay of Proceedings will enable the Company to finalize and implement the SISP;
- (e) provided that the proposed ARIO is granted, the Company is forecasted to have sufficient liquidity to support its ordinary course operations and the costs of these CCAA proceedings throughout the Stay Period;
- (f) the Monitor is supportive of the proposed extension of the Stay of Proceedings; and
- (g) neither the Company nor the Monitor is aware of any party opposed to the requested extension of the Stay of Proceedings.²³

25. Accordingly, the Company submits that the proposed extension of the Stay of Proceedings is in the best interests of the Company and its stakeholders, is consistent with the purposes of the CCAA, and is appropriate in the circumstances.

B. Increasing the Administration Charge

26. The Company seeks to increase the Administration Charge from \$200,000 to \$300,000.

27. Pursuant to section [11.52](#) of the CCAA, the Court may grant an administration charge and, in deciding whether to grant such a charge, the Court may consider, among other things:

- (a) the size and complexity of the business being restructured;

²³ Second White Affidavit, at paras. 10, 13-19, Motion Record, Tab 2; Monitor's First Report, at paras. 30-32.

- (b) the proposed role of the beneficiaries of the charge;
- (c) whether there is 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.²⁴

28. The Company submits that it is appropriate for this Court to exercise its discretion to increase the Administration Charge for the following reasons:

- (a) the beneficiaries of the Administration Charge have and will continue to contribute to these CCAA proceedings and assist with Company with achieving its objectives in connection with, among other things, the SISP and Stalking Horse APA;
- (b) each of the proposed beneficiaries of the Administration Charge is performing unique functions without duplication of roles;
- (c) the quantum of the proposed increase to the Administration Charge is fair and reasonable, and is in line with the nature and size of the Company's business and the involvement required by the professionals; and
- (d) the Monitor is supportive of the increase in the Administration Charge.²⁵

²⁴ *Lydian International Limited (Re)*, 2019 ONSC 7473, at paras [46-48](#); *McEwan Enterprises Inc*, 2021 ONSC 6453, at paras [49-50](#); *MPX International Corporation*, 2022 ONSC 4348, at para [63-64](#).

²⁵ First White Affidavit at paras. 86-87, Motion Record, Tab 2A; Second White Affidavit at paras. 20-22, Motion Record, Tab 2; Monitor's First Report at paras. 20-24.

C. Increasing the DIP Lender's Charge

29. In accordance with section [11.001](#) and subsection [11.2\(5\)](#) of the CCAA, the Initial Order limited the quantum of the DIP Lender's Charge to what was reasonably necessary for the Company's continued operations in the ordinary course of business during the Initial Stay Period. Pursuant to the proposed ARIO, the Company now seeks to increase the quantum of the DIP Lender's Charge from \$300,000 to \$500,000, being the maximum borrowings available under the DIP Facility.²⁶

30. This Court's jurisdiction to approve debtor in possession financing and grant a corresponding charge under section [11.2](#) of the CCAA also extends to the approval of the proposed increase to the DIP Lender's Charge, provided this Court is satisfied that the requirements of subsection [11.2\(1\)](#) have been met and that the considerations enumerated in subsection [11.2\(4\)](#) of the CCAA support the relief sought.²⁷

(i) Subsection 11.2(1) of the CCAA

31. The foregoing requirements were satisfied when this Court issued the Initial Order approving the DIP Facility and granting the DIP Lender's Charge. The Company respectfully submits that such requirements continue to be satisfied here.

32. In accordance with the requirements of subsection [11.2\(1\)](#) of the CCAA:

- (a) notice of the within Motion has been given to the Company's key stakeholder;

²⁶ Second White Affidavit, at paras. 23-25, Motion Record, Tab 2.

²⁷ *Lydian International Limited (Re)*, 2020 ONSC 4006, at para. [66](#).

- (b) the DIP Lender is the Company's only secured creditor;
- (c) the DIP Lender's Charge does not secure any obligations arising prior to the Initial Order; and
- (d) the Cash Flow Forecast substantiates the Company's need for additional borrowings under the DIP Facility up to the aggregate amount of approximately \$500,000 during the Stay Period.²⁸

(ii) Section [11.2\(4\)](#) of the CCAA

33. When determining whether to grant a charge securing debtor in possession financing, subsection [11.2\(4\)](#) of the CCAA directs the Court to consider the following non-exhaustive factors:

- (a) the period during which the applicant is expected to be subject to the CCAA proceedings;
- (b) how the applicant's business and financial affairs are to be managed during the CCAA proceedings;
- (c) whether the applicant has the confidence of its major creditors;
- (d) whether the financing would enhance the prospects of a viable compromise or arrangement being made in respect of the applicant;
- (e) the nature and value of the applicant's property;

²⁸ First White Affidavit at paras. 19, 23, Motion Record, Tab 2A; Second White Affidavit at para. 27, Motion Record, Tab 2; Monitor's First Report at paras. 12-16.

- (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
- (g) the proposed monitor's report, if any.²⁹

34. In view of the non-exhaustive factors enumerated under subsection [11.2\(4\)](#) of the CCAA, the following supports the approval of the proposed increase to the DIP Lender's Charge:

- (a) pursuant to the DIP Commitment, all advances under the DIP Facility are to be secured by the DIP Lender's Charge;
- (b) as noted above, the Cash Flow Forecast substantiates the Company's need for additional borrowings under the DIP Facility up to the aggregate amount of \$500,000 during the Stay Period;
- (c) absent an increase to the DIP Lender's Charge, the Company will not be permitted to request the additional advances required under the DIP Facility to maintain the Company's ordinary course operations or to fund these CCAA proceedings during the Stay Period;
- (d) if the Company is unable to request additional advances under the DIP Facility, it will be forced to cease operations to the detriment of its stakeholders; and
- (e) the Monitor is of the view that the proposed increase to the DIP Lender's Charge is appropriate in the circumstances.³⁰

²⁹ CCAA, s. [11.2\(4\)](#); *Re Just Energy Corp*, 2021 ONSC 1793, at para. [61](#).

³⁰ Second White Affidavit, at paras. 26-29, Motion Record, Tab 2; Monitor's First Report at paras. 12-16, 27.

PART V – RELIEF REQUESTED

35. The Company submits that the relief sought on the within motion is appropriate in the circumstances and consistent with prior orders of this Court and respectfully request that the proposed form of ARIO be granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED on January 27, 2023.

Dentons Canada LLP

DENTONS CANADA LLP
Counsel for the Applicant

**SCHEDULE “A”
LIST OF AUTHORITIES**

1. *Laurentian University of Sudbury*, [2021 ONSC 1098](#)
2. *Canwest Global Communications Corp.*, [2011 ONSC 2215](#)
3. *Target Canada Co. (Re)*, [2015 ONSC 303](#)
4. *Timminco Limited (Re)*, [2012 ONSC 2515](#)
5. *Lydian International Limited (Re)*, [2019 ONSC 7473](#)
6. *McEwan Enterprises Inc*, [2021 ONSC 6453](#)
7. *MPX International Corporation*, [2022 ONSC 4348](#)
8. *Lydian International Limited (Re)*, [2020 ONSC 4006](#)
9. *Re Just Energy Corp*, [2021 ONSC 1793](#)

**SCHEDULE “B”
RELEVANT STATUTES**

[Companies' Creditors Arrangement Act, RSC 1985, c C-36](#)

Relief reasonably necessary

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.

Interim financing

11.2 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

Priority — secured creditors

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

Priority — other orders

(3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

Factors to be considered

- (4) In deciding whether to make an order, the court is to consider, among other things,
- (a) the period during which the company is expected to be subject to proceedings under this Act;
 - (b) how the company's business and financial affairs are to be managed during the proceedings;
 - (c) whether the company's management has the confidence of its major creditors;

- (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
- (e) the nature and value of the company's property;
- (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
- (g) the monitor's report referred to in paragraph 23(1)(b), if any.

Additional factor — initial application

(5) When an application is made under subsection (1) at the same time as an initial application referred to in subsection 11.02(1) or during the period referred to in an order made under that subsection, no order shall be made under subsection (1) unless the court is also satisfied that the terms of the loan are limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

Stays, etc. — other than initial application

[11.02](#) (2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

- (a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);
- (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
- (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Court may order security or charge to cover certain costs

[11.52](#) (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

- (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;

(b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

Priority

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

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