

**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. (the "**Applicant**")

FACTUM OF THE APPLICANT

(Returnable January 20, 2023)

January 20, 2023

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PART I – OVERVIEW

1. Tehama Inc. (the “**Company**”) files this factum in support of its application to the Ontario Superior Court of Justice (Commercial List) (the “**Court**”) for protection from its creditors pursuant to the *Companies’ Creditors Arrangement Act*, RSC 1985, c C-36 (the “**CCAA**”).

2. In its application, the Company is seeking an order (the “**Initial Order**”) for the following relief:

- (a) declaring that the Company is a party to which the CCAA applies;
- (b) appointing Deloitte Restructuring Inc., as monitor of the Company in these proceedings (the “**Monitor**”), subject to the permissions of the Court as required under section [11.7\(2\)](#) of the CCAA;
- (c) granting an administration charge in the amount of \$200,000 (the “**Administration Charge**”), in favour of counsel to the Company, the Monitor and its counsel, and counsel to the DIP Lender (as defined herein);
- (d) approving the DIP Facility (as defined herein), authorizing borrowings under the DIP Commitment in an amount up to \$300,000, and granting a charge in favour of the DIP Lender (the “**DIP Lender’s Charge**”);
- (e) granting a directors’ charge in favour of the Company’s directors and officers in the amount of \$225,000 (the “**Directors’ Charge**”, and together with the Administration Charge and DIP Lender’s Charge, the “**Priority Charges**”); and
- (f) granting an initial stay of proceedings to January 30, 2023 (the “**Stay Period**”).

3. If the Initial Order is granted, the Company intends to return to Court no later than January 30, 2023 (the “**Comeback Hearing**”) to seek additional relief pursuant to the CCAA.

4. The Company currently has liabilities exceeding \$5 million, is insolvent, is a company to which the CCAA applies, and is facing a liquidity crisis. Without interim financing and creditor protection, the Company will be unable to operate in the ordinary course of business. Additional funding will be needed by the Company in order to provide it with sufficient liquidity to operate, make critical payables, including payroll, and undertake the proposed restructuring process, including the implementation of a sale and investment solicitation process (“**SISP**”).

PART II – FACTS

5. The facts relevant to this application are fully set out in the affidavit of Rob White sworn January 20, 2023 (the “**White Affidavit**”).¹ All capitalized terms used but not otherwise defined herein have the meanings given to them in the White Affidavit.

A. Overview of the Company’s Business

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.² Although the Company is currently facing a liquidity crisis, with the benefit of the protections afforded by the CCAA, the

¹ White Affidavit, Applicant’s Application Record dated January 20, 2023 (the “**Application Record**”), Tab 2.

² White Affidavit at para. 8, Application Record, Tab 2.

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

B. Corporate Structure

7. The Company is a private company incorporated under the *Canada Business Corporations Act*, RSC, 1985, c. C-44, and is extra-provincially registered to carry on business in Ontario under the *Ontario Business Corporations Act*, RSO 1990, c. B.16. The Company has its registered head office located at 319 Mcrae Avenue, Suite 701, Ottawa, Ontario, K1Z 0B9 (the “**Office Premises**”). The directors of the Company are Paul Vallée (“**Vallée**”), Shawn Chance and Michael Aiello.⁴

C. Assets and Liabilities

8. The Company's internal financial statements for the period ended as at December 31, 2022 (unaudited) reveal that the Company sustained a net loss of US\$7,692,184 on revenue of approximately US\$3,602,040.⁵ As at December 31, 2022, the Company had:

- (a) total assets with a book value of approximately US\$6,893,347, which primarily consisted of cash, receivables and prepaid expenses, capital and intangible assets;
and

³ White Affidavit at para. 13, Application Record, Tab 2.

⁴ White Affidavit at paras. 14-15, Application Record, Tab 2.

⁵ White Affidavit at para. 16, Application Record, Tab 2.

- (b) total liabilities with a book value of approximately US\$10,203,136, which primarily consisted of accounts payable and accrued liability, lease obligations, deferred revenue, convertible and term loan debt liabilities.⁶

D. Stakeholders

(i) Secured Creditors

9. Until January 11, 2023, the Company's sole secured creditor was Canadian Imperial Bank of Commerce ("**CIBC**"). Pursuant to a letter of credit agreement dated April 21, 2021, as amended by the first amending agreement dated May 7, 2021 (collectively, the "**Credit Agreement**"), CIBC made available to the Company a demand operating facility in the maximum amount of US\$1,500,000 million (the "**Operating Facility**"), a term loan in the amount of US\$3,000,000 (the "**Term Loan**") and a VISA credit facility in the maximum amount of US\$150,000 (the "**Credit Card Facility**", and collectively with the Operating Facility and the Term Loan, the "**Credit Facilities**"). The Company also maintained its cash management system and bank accounts (the "**Bank Accounts**") with CIBC.⁷

10. As security for the Company's indebtedness under the Credit Agreement, CIBC obtained various security (collectively, the "**Security Documents**"), including a general security agreement dated April 20, 2021, granting CIBC a first-priority security interest in all present and future personal property of the Company (the "**GSA**").⁸

⁶ White Affidavit at paras. 17-18, Application Record, Tab 2.

⁷ White Affidavit at paras. 19-20, 24-25, Application Record, Tab 2.

⁸ White Affidavit at paras. 21-22, Application Record, Tab 2.

11. The Company borrowed the total value of the committed Term Loan, and used the Credit Card Facility to make periodic payments to its vendors. As at December 14, 2022, the Company owed CIBC approximately \$3,053,930.77 in connection with the Credit Facilities (the “**CIBC Indebtedness**”).⁹

12. CIBC’s registered its security interest search under the Ontario *Personal Property Security Act* on April 9, 2021. There are no other PPSA registrations against the Company.¹⁰

(ii) Unsecured Obligations

Convertible Promissory Notes

13. On January 31, 2022, the Company closed an 8% US\$3,000,000 convertible note purchase agreement (the “**Initial Note Offering**”) with Vallée, OMERS and BDC (collectively, the “**Note Investors**”). On October 24, 2022, the Company and the Note Investors entered into an amended and restated note purchase agreement (the “**Amended and Restated Note Offering**”), pursuant to which Vallée purchased an additional convertible promissory note in the amount of US\$1,000,000.¹¹

14. As at the date hereof, all amounts advanced pursuant to the Amended and Restated Note Offering remain owing by the Company, being US\$4,000,000 (approximately CA\$5,400,000), plus accrued interest.¹²

⁹ White Affidavit at para. 23, Application Record, Tab 2.

¹⁰ White Affidavit at paras. 26-27, Application Record, Tab 2.

¹¹ White Affidavit at paras. 28-29, Application Record, Tab 2.

¹² White Affidavit at para. 30, Application Record, Tab 2.

Federal Economic Development Agency for Southern Ontario (“FEDASO”)

15. On August 3, 2021, the Company entered into a Business Scale-up and Productivity Contribution Agreement (the “**Contribution Agreement**”) with FEDASO. The Contribution Agreement arises from a government funded program pursuant to which FEDASO funds Eligible and Supported Costs (as defined in the Contribution Agreement) in respect of the Company’s current and potential new workforce obligations on an unsecured and zero-interest basis.¹³

16. The maximum amount the Company is eligible to receive under the Contribution Agreement is \$2,700,000. To date, the Company has received approximately \$1,519,570 under the program. The Company’s repayment obligations in respect of the Contribution Agreement begin on April 15, 2024.¹⁴

(iii) Suppliers

17. As at December 31, 2022, the Company owes approximately US\$666,000 (approximately CA\$890,000) to its suppliers. The most significant trade payable is owed to Amazon Web Services Inc. (“**AWS**”) in the approximate amount of US\$365,000. The Company’s platform is operated on and by AWS. The Company cannot serve its customers without the underlying infrastructure provided by AWS.¹⁵

18. It is proposed that certain key suppliers would not be affected by the commencement of these CCAA proceedings and that amounts owing for goods or services actually provided to the Company prior to the date of the proposed Initial Order may be paid if, in the opinion of the

¹³ White Affidavit at paras. 31-32, Application Record, Tab 2.

¹⁴ White Affidavit at para. 33, Application Record, Tab 2.

¹⁵ White Affidavit at para. 34, Application Record, Tab 2.

Company and the Monitor, such third party is critical to the ongoing operations of the Company. It is anticipated that post-filing amounts for such critical supply for goods or services will be made in the ordinary course.¹⁶

E. Strategic Initiatives

(i) Efforts to Improve Financial Position and Secure New Investment/Financing

19. In recent months, the Company has made various business decisions in an effort to improve its financial situation, including: (a) reducing its workforce; (b) implementing a salary deferral for the Company's executives; (c) implementing a cost-rationalization strategy; (d) negotiating new payment terms in respect of trade payables and adjusting vendor contracts to achieve better rates and payment terms; (e) approaching the Company's major stakeholders to support a potential restructuring of the debt; and (f) meeting with potential new investors in the Company.¹⁷

F. Financial Situation and Need for CCAA Relief

(i) Background

20. The Company is currently facing an immediate and severe liquidity crisis, due to a number of external factors. Without immediate relief, including additional financing and a stay of enforcement actions, the Company will inevitably be forced to cease its going concern operations and liquidate its assets.¹⁸

¹⁶ White Affidavit at para. 35, Application Record, Tab 2.

¹⁷ White Affidavit at paras. 45-46, Application Record, Tab 2.

¹⁸ White Affidavit at para. 48, Application Record, Tab 2.

(ii) CIBC Demand and Set-Off

21. One such factor affecting the Company's liquidity is its recent issues with CIBC. As noted above, the Company utilized the availability under the Term Loan and Credit Card Facility in the ordinary course of business. The Company has never drawn on the Operating Facility.¹⁹

22. As more fulsomely set out in the White Affidavit, by letter sent on December 12, 2022 (the "**December 12 Letter**"), CIBC advised the Company that it was terminating the Operating Facility due to the Company's "deteriorating financial performance".²⁰

23. Two days later, on December 14, 2022, the Company received a letter from CIBC's lawyers (the "**CIBC Demand Letter**") that, among other things: (i) advised that the Company was in breach of certain financial covenants which represented an Event of Default under the Credit Agreement; (ii) declared the entire outstanding balance of the Credit Facilities to be immediately due and payable; and (iii) enclosed CIBC's Notice of Intention to Enforce Security under section [244\(1\)](#) of the *Bankruptcy and Insolvency Act* (Canada) ("**BIA**").²¹

24. On January 6, 2023, CIBC advised the Company that it had frozen the Bank Accounts effective immediately, together with the rolling availability under the Credit Card Facility. Shortly after, the Company began receiving notices from its vendors stating that the Company's credit card payments were being declined. Unless the Bank Accounts were unfrozen, the Company could not

¹⁹ White Affidavit at para. 50, Application Record, Tab 2.

²⁰ White Affidavit at paras. 51-53, Application Record, Tab 2.

²¹ White Affidavit at para. 54, Application Record, Tab 2.

make critical payables, including an upcoming payroll due to be processed on Monday, January 9, 2023.²²

25. On January 8, 2023, Vallée and White presented CIBC with an offer to acquire the CIBC Indebtedness, together with the Security Documents. Following some lengthy negotiations, the parties reached business terms for the assignment (the “**Assignment**”). Vallée, White and others then incorporated 14667913 Canada Inc. (“**Newco**”) for the purposes of completing the Assignment and the funding of the critical payments required to be made in order maintain and stabilize the Company’s business.²³

26. On January 11, 2023, Newco and CIBC entered into an assignment of debt and security. At about the same time, Newco commenced funding critical payables on behalf the Company, including payroll; however, the Company requires additional funding to make its critical payables going forward.²⁴

G. DIP Financing

27. Because of the current liquidity challenges, the Company requires interim financing to provide stability, continued going concern operations and to restructure its business as part of these CCAA proceedings.²⁵

28. The Company has requested that Newco (in such capacity, the “**DIP Lender**”) provide interim financing during the CCAA proceedings. The DIP Lender has agreed to provide a debtor

²² White Affidavit at para. 56-57, Application Record, Tab 2.

²³ White Affidavit at paras. 60-61, Application Record, Tab 2.

²⁴ White Affidavit at paras. 62-64, Application Record, Tab 2.

²⁵ White Affidavit at para. 75, Application Record, Tab 2.

in possession facility (the “**DIP Facility**”) pursuant to the terms of the term sheet dated January 19, 2023 (the “**DIP Commitment**”). The DIP Commitment provides, among other things, for a maximum facility size of \$500,000 which bears interest at a rate of 5% per annum.²⁶

29. The DIP Facility requires that advances be secured by the DIP Lender’s Charge on all of the present and future assets, property and undertaking of the Company (collectively, the “**Property**”). The DIP Lender’s Charge will be limited to the amounts actually drawn on the DIP Facility, plus any applicable interest, fees and costs. The DIP Lender’s Charge will have priority over all other security interests, charges and liens, except the Administration Charge and Directors’ Charge. The Cash Flow Forecast projects that the Company will be required to draw up to the principal amount of \$300,000 under the DIP Facility within the first ten days after the Initial Order is granted.²⁷

PART III – ISSUES

30. The issues before this Honourable Court are whether:

- (a) the Company is a “debtor company” to which the CCAA applies;
- (b) Ontario is the appropriate venue for these CCAA proceedings;
- (c) the Stay of Proceedings should be granted;
- (d) the Court should approve the proposed DIP Facility and grant the DIP Lender’s Charge;

²⁶ White Affidavit at para. 76, Application Record, Tab 2.

²⁷ White Affidavit at para. 77, Application Record, Tab 2.

- (e) the Company should be authorized to make certain pre-filing payments;
- (f) the Directors' Charge should be granted; and
- (g) the Administration Charge should be granted.

PART IV – LAW AND ARGUMENT

A. Each Applicant is a Debtor Company to which the CCAA Applies

31. The CCAA applies in respect of a “debtor company” whose liabilities exceed \$5 million. The CCAA defines a “debtor company” as “any company” that is, among other things, “insolvent”.²⁸

32. The term “company” is defined under the CCAA as “any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province”.²⁹ The Company is incorporated pursuant to the provisions of the CBCA and, as such, is a “company” to which the CCAA applies.³⁰

33. In the absence of a definition for the term “insolvent” under the CCAA, Courts have referred to the definition of “insolvent person” in subsection [2\(1\)](#) of the BIA. The BIA defines “insolvent person” as a person:

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

²⁸ CCAA, s. [3\(1\)](#); *MPX International Corporation*, [2022 ONSC 4348](#) at para [46](#) (“*MPX*”); *Laurentian University of Sudbury*, [2021 ONSC 659](#) at para [25](#) (“*Laurentian*”); *McEwan Enterprises Inc.*, [2021 ONSC 6453](#) at para [24](#) (“*McEwan*”).

²⁹ CCAA, s. [3\(2\)](#).

³⁰ White Affidavit at para. 14, Application Record, Tab 2.

- (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.³¹

36. The test for determining whether a company is an “insolvent person” under the BIA is disjunctive such that satisfaction of any one of the above criteria is sufficient.³²

37. In addition to the test under the BIA, a company is also insolvent for the purposes of the CCAA if “there is a reasonably foreseeable (at the time of filing) expectation that there is a looming liquidity condition or crisis which will result in the applicant running out of ‘cash’ to pay its debts as they generally become due in the future without the benefit of the [stay] and ancillary protection”.³³

38. Applied here, the Company is insolvent. It has substantial liabilities, is facing a significant liquidity crisis and does not have the means to satisfy its liabilities. Given the Company’s limited cash on hand, it has no prospect of satisfying its obligations as they become due absent the relief sought under the proposed Initial Order. Taken together, the Company is a debtor company whose liabilities exceed \$5 million to which the CCAA applies.³⁴

³¹ BIA, s. 2 “insolvent person”.

³² [McEwan](#), at para 26; [Laurentian](#), at para 31.

³³ [McEwan](#), at para 27; [Laurentian](#), at para 32.

³⁴ White Affidavit at paras. 71-73, Application Record, Tab 2.

B. Ontario is the Appropriate Venue for these CCAA Proceedings

34. Pursuant to subsection [9\(1\)](#) of the CCAA, an application under the CCAA may be “made to the court that has jurisdiction in the province within which the head office or chief place of business of the company in Canada is situated”.³⁵

35. The Company’s registered office and centre of operations is located in Ontario. As such, Ontario is the appropriate venue for these CCAA proceedings and this Court has jurisdiction to hear this application.³⁶

C. The Stay of Proceedings Should be Granted

36. Section [11.02](#) of the CCAA provides this Court with the jurisdiction to impose a stay of proceedings for a period of not more than 10 days if it is satisfied that circumstances exist that make the order appropriate.³⁷

37. The jurisdiction vested in Courts to stay proceedings under section 11.02 “should be construed broadly to accomplish the legislative purposes of the CCAA”. These purposes include, among others, enabling the continuation of the applicant’s business and avoiding the social and economic costs of a liquidation. Accordingly, a stay of proceedings will be appropriate where it maintains the status quo and provides applicants with breathing room while they seek to restore solvency and emerge from the CCAA on a going-concern basis.³⁸

³⁵ CCAA, s. [9\(1\)](#).

³⁶ White Affidavit at paras. 9, 14-15, Application Record, Tab 2.

³⁷ CCAA, s. [11.02](#).

³⁸ *Century Services Inc v Attorney General (Canada)*, [2010 SCC 60](#) at paras 14-15.

38. Here, the proposed Stay of Proceedings is intended to prevent enforcement action by, among others, the Company's contractual counterparties and disruption to the Company's business (the "**Business**"). The proposed Stay of Proceedings will preserve the *status quo* and afford the Company the breathing space and stability required to advance its restructuring efforts, including developing a SISP and/or exploring other transaction alternatives. Additionally, it will permit the Company to continue to operate the Business as a going concern with minimal disruption. The continued and uninterrupted operation of the Business will preserve value for the Company's stakeholders and is in the best interests of, among others, the Company's employees and suppliers.³⁹

39. The Company submits that the proposed 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.

D. The Proposed DIP Facility and DIP Lender's Charge Should be Approved

40. Subsection [11.2\(1\)](#) of the CCAA authorizes this Court to approve debtor in possession financing and grant a corresponding charge in an amount it considers appropriate – having regard to the debtor company's cash flow statement – where the secured creditors likely to be affected by the charge are given notice thereof. A charge granted pursuant to subsection [11.2\(1\)](#) of the CCAA may not secure an obligation that exists before the proposed order is made.⁴⁰

³⁹ White Affidavit at para. 74, Application Record, Tab 2.

⁴⁰ CCAA, s. [11.2\(1\)](#); *Re Just Energy Corp*, [2021 ONSC 1793](#) at para [52](#) ("**Just Energy**").

41. Each of statutory prerequisites to approving the DIP Facility and granting the proposed DIP Lender's Charge are satisfied in this case.

(i) The Proposed DIP Facility is Limited to what is Reasonably Necessary

42. On an initial application, subsection [11.2\(5\)](#) of the CCAA requires this Court to be 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 the initial 10-day stay period.⁴¹

43. Subsection [11.2\(5\)](#) of the CCAA affirms the Courts' general approach to limit DIP financing to “what is reasonably necessary to meet the debtor company's urgent needs over the sorting-out period”. As Hainey J. stated in *Re Clover Leaf Holdings Company*, DIP financing will be reasonably necessary under subsection [11.2\(5\)](#) of the CCAA where it provides the applicant with the liquidity necessary to “keep the lights on”, ensure the continued operations of the applicant's business and preserve enterprise value while a restructuring is pursued.⁴²

44. As described above, the Company is facing a severe liquidity crisis, has limited cash on hand and has accrued significant accounts payable. The amount to be funded under the DIP Facility during the Stay Period has been limited to that which is necessary to ensure the continued operations of the Business and maintain the status quo. Without access to the DIP Facility, the

⁴¹ *Just Energy*, at para [58](#); *Re Clover Leaf Holdings Company*, [2019 ONSC 6966](#) at para [20](#) (“*Clover Leaf*”); *Miniso International Hong Kong Limited v Migu Investments Inc*, [2019 BCSC 1234](#) at para [80](#) (“*Miniso*”).

⁴² *Clover Leaf*, at paras [20-21](#); *Miniso*, at paras [86, 88](#).

Company will be forced to immediately cease operations to the detriment of its stakeholders. In the circumstances, the Company submits that subsection [11.2\(5\)](#) is satisfied.⁴³

(ii) The Proposed DIP Facility Satisfies the Criteria in Subsections 11.2(1) and 11.2(4) of the CCAA

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

- (a) the period during which the applicants are 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'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 applicant;
- (e) the nature and value of the applicant's property;
- (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
- (g) the proposed monitor's report, if any.

⁴³ White Affidavit at paras. 75-78, Application Record, Tab 2.

46. Having regard to the foregoing factors and the requirements of subsection [11.2\(1\)](#) of the CCAA, the following supports the approval of the DIP Facility and the granting of the DIP Lender's Charge:

- (a) the Company is facing a severe liquidity crisis, has limited cash on hand and is overdue on several of its obligations, including to certain third party suppliers of goods and services;
- (b) the Cash Flow Forecast substantiates the urgent need for DIP financing to provide the Company with the liquidity necessary to continue the Company's ordinary course operations;
- (c) the amount to be funded under the DIP Facility is appropriate having regard to the Cash Flow Forecast and the amount that is proposed to be funded during the Stay Period;
- (d) the DIP Facility will preserve the value and going concern operations of the Company, which is in the best interests of the Company and its stakeholders;
- (e) the DIP Facility is conditional on the granting of the DIP Lender's Charge, which does not secure any obligations incurred prior to these CCAA proceedings;
- (f) under the terms of the Initial Order, the DIP Lender's Charge will not rank in priority to any security interest in favour of any person that has not been served with notice of the within application; and

- (g) the Monitor is supportive of the DIP Facility and the DIP Lender's Charge, and does not believe that creditors will be materially prejudiced as a result of their approval.⁴⁴

F. The Company Should be Authorized to Make Certain Pre-Filing Payments

47. To preserve continuity in the Business, the proposed Initial Order authorizes (but does not require) the Company to pay amounts owing for goods and services actually supplied to the Company prior to, on, or after the date of the Initial Order. Importantly, such payments may only be made with the consent of the Monitor.⁴⁵

48. This Court's jurisdiction under section [11](#) of the CCAA to permit payment of pre-filing obligations where such payment is essential to the ongoing business operations of the applicant, is well established. In accordance with section [11.001](#) of the CCAA, where the Court exercises its discretion to grant relief under section [11](#) on an initial application, the relief must be reasonably necessary for the continued operations of the debtor company in the ordinary course of business.⁴⁶

49. In authorizing such payments, including upon an initial application under the CCAA, Courts have considered, among other factors:

- (a) whether the applicant has sufficient inventory of the goods on hand to meet their needs;
- (b) whether the goods and services were integral to the business of the applicants;

⁴⁴ White Affidavit at paras. 48-49, 61, 74-78, Application Record, Tab 2.

⁴⁵ White Affidavit at para. 93, Application Record, Tab 2.

⁴⁶ CCAA, s. [11.01](#); [McEwan](#), at para [32](#); *Re Performance Sports Group Ltd*, [2016 ONSC 6800](#) at para [24](#) ("*Performance Sports*"); [MPX](#), at paras [69-70](#).

- (c) the applicant's need for the uninterrupted supply of the goods and services;
- (d) the effect on the applicant's operations and ability to restructure if they could not make pre-filing payments;
- (e) the fact that no payments would be made without the consent of the Court-appointed monitor; and
- (f) the Court-appointed monitor's willingness to work with the applicants to ensure that payments to suppliers in respect of pre-filing liabilities are minimized.⁴⁷

50. Applying these factors, the Company submits that the requested relief to pay pre-filing amounts in the manner prescribed by the proposed Initial Order is appropriate, given that:

- (a) the Company is dependent on the continued and uninterrupted supply of certain key services;
- (b) absent authorization to make the proposed pre-filing payments, the Company is concerned that its third party suppliers may cease providing goods and services to it;
- (c) a disruption in the supply of essential goods and services to the Company could imperil its continued operations to the detriment of the Company's restructuring efforts and its stakeholders;

⁴⁷ *McEwan*, at para 33; *MPX*, at paras 69-70; *Performance Sports*, at paras 24-25.

- (d) the proposed pre-filing payments for essential goods and services can only be made with the consent of the Monitor; and
- (e) the proposed Monitor has advised that, if appointed, it will engage with the Company to ensure that payments to suppliers in respect of pre-filing liabilities are limited to the extent reasonably possible.⁴⁸

G. The Directors' Charge Should be Granted

51. The Company is seeking a Directors' Charge in the amount of \$225,000 to secure the indemnity of its directors and officers for liabilities they may incur during these CCAA proceedings. The Directors' Charge is proposed to rank in priority to the DIP Lender's Charge but subordinate to the Administration Charge.

52. Section [11.51](#) of the CCAA authorizes this Court to grant a charge in favour of a debtor company's directors and officers in an amount it considers appropriate where the secured creditors likely to be affected by the charge are given notice thereof. Such a charge may not be granted if the Court is of the opinion that "adequate indemnification insurance for the director or officer" could be obtained by the debtor company at a reasonable cost.⁴⁹

53. A charge securing the indemnity of a debtor company's directors and officers is both "common place and essential to [...] the success of any possible restructuring" as it is not otherwise reasonable to expect a debtor company's directors and officers to continue. The objective of such

⁴⁸ White Affidavit at paras. 79-85, Application Record, Tab 2.

⁴⁹ CCAA, s. [11.51\(1\)-\(4\)](#); *US Steel Canada Inc, Re*, [2014 ONSC 6145](#) at para [20](#) ("*US Steel*"); *Lydian International Limited (Re)*, [2019 ONSC 7473](#) ("*Lydian*"), at para [52](#).

charges 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”.⁵⁰

54. In granting charges securing the indemnity of a debtor company’s directors and officers, Courts have considered, among other things, whether:

- (a) notice has been given to the secured creditors likely to be affected by the charge;
- (b) the amount of the proposed charge is appropriate given the directors’ and officers’ estimated exposure;
- (c) the charge applies in respect of any obligation incurred by a director or officer as a result of the directors’ or officers’ gross negligence or willful misconduct; and
- (d) the debtor company could obtain adequate indemnification insurance for the director at a reasonable cost.⁵¹

55. Here, the Company submits that it is appropriate for this Court to exercise its jurisdiction to grant the proposed Directors’ Charge, given that:

- (a) the Directors’ Charge only covers obligations and liabilities that the Company’s directors and officers incur after the commencement of the CCAA proceedings and does not indemnify the directors and officers in the event of willful misconduct or gross negligence;

⁵⁰ [MPX](#), at para [66](#).

⁵¹ [Lydian](#), at paras [52-54](#); [MPX](#), at paras [66-68](#); [McEwan](#), at para [53](#).

- (b) the amount of the Directors' Charge is reasonable in the circumstances and, in consultation with the Monitor, has been limited to the potential exposure of the Company's directors and officers during the Stay Period under the terms of the Initial Order, the Directors' Charge will not rank in priority to any security interest in favour of any person that has not been served with notice of the within application; and
- (c) the Monitor is supportive of the proposed Directors' Charge.⁵²

H. The Administration Charge Should be Granted

56. The Company is seeking the Administration Charge in the amount of \$200,000 to secure the professional fees and disbursements of the Monitor, along with counsel to the Monitor and the Company, at their standard rates and charges, incurred prior and subsequent to the granting of the Initial Order.

57. Section [11.52](#) of the CCAA vests this Court with jurisdiction to grant an administration charge on notice to the secured creditors likely to be affected thereby in favour of, among others, a Court-appointed monitor, its legal advisors and any legal experts engaged by the debtor company. As this Court held in *Re U.S. Steel Canada Inc.*, it is essential to the success of any CCAA restructuring "to order a super-priority in respect of charges securing professional fees and disbursements".⁵³

⁵² White Affidavit at paras. 88-89, Application Record, Tab 2.

⁵³ *US Steel*, at para [22](#).

58. The following list of non-exhaustive factors may inform a Court's decision to grant an administration charge:

- (a) the size and complexity of the business being restructured;
- (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.⁵⁴

59. In this case, the Company submits that it is appropriate for this Court to exercise its jurisdiction and grant the proposed Administration Charge, given that:

- (a) the Company requires the knowledge, expertise and continued participation of the beneficiaries of the Administration Charge during these CCAA proceedings;
- (b) the beneficiaries of the Administration Charge have, and will continue to, contribute to these CCAA proceedings and assist the Company with continuing the Business in the ordinary course;
- (c) the beneficiaries of the Administration Charge do not have the benefit of retainers, and now have significant accrued fees;

⁵⁴ [Lydian](#), at paras 46-48; [McEwan](#), at paras 49-50; [MPX](#), at para 63-64.

- (d) the Company has no other means of retaining the beneficiaries of the Administration Charge, and each beneficiary is performing distinct functions;
- (e) under the terms of the Initial Order, the Administration Charge will not rank in priority to any Encumbrances in favour of any person that has not been served with notice of the within application; and
- (f) the Monitor is supportive of the Administration Charge.

PART V – RELIEF REQUESTED

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

ALL OF WHICH IS RESPECTFULLY SUBMITTED on January 20, 2023.



A handwritten signature in blue ink that reads "Dentons Canada LLP". The signature is written in a cursive, flowing style. Below the signature is a solid horizontal line.

DENTONS CANADA LLP
Counsel for the Applicant

**SCHEDULE “A”
LIST OF AUTHORITIES**

1. *MPX International Corporation*, [2022 ONSC 4348](#)
2. *Laurentian University of Sudbury*, [2021 ONSC 659](#)
3. *McEwan Enterprises Inc*, [2021 ONSC 6453](#)
4. *Century Services Inc v Attorney General (Canada)*, [2010 SCC 60](#)
5. *Re Just Energy Corp*, [2021 ONSC 1793](#)
6. *Re Clover Leaf Holdings Company*, [2019 ONSC 6966](#)
7. *Miniso International Hong Kong Limited v Migu Investments Inc*, [2019 BCSC 1234](#)
8. *Re Performance Sports Group Ltd*, [2016 ONSC 6800](#)
9. *US Steel Canada Inc, Re*, [2014 ONSC 6145](#)
10. *Lydian International Limited (Re)*, [2019 ONSC 7473](#)

**SCHEDULE “B”
RELEVANT STATUTES**

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

2(1) insolvent person means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

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

Advance notice

244 (1) A secured creditor who intends to enforce a security on all or substantially all of

- (a) the inventory,
- (b) the accounts receivable, or
- (c) the other property

of an insolvent person that was acquired for, or is used in relation to, a business carried on by the insolvent person shall send to that insolvent person, in the prescribed form and manner, a notice of that intention.

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

Affiliated companies

3(2) For the purposes of this Act,

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

Jurisdiction of court to receive applications

9(1) Any application under this Act may be made to the court that has jurisdiction in the province within which the head office or chief place of business of the company in Canada is

situated, or, if the company has no place of business in Canada, in any province within which any assets of the company are situated.

General power of court

[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.

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.

Stays, etc. — initial application

[11.02](#) (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 10 days,

- (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act;
- (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
- (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Stays, etc. — other than initial application

(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.

Burden of proof on application

(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.

Restriction

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

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.

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.

Security or charge relating to director's indemnification

[11.51](#) (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

Priority

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

Restriction — indemnification insurance

(3) The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

Negligence, misconduct or fault

(4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

Court may order security or charge to cover certain costs

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

- (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
- (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
- (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

Priority

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

Restrictions on who may be monitor

[11.7](#)(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).

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

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

Proceedings commenced at Toronto, Ontario

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