

Court File No.: CV-24-00713128-0000

**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 SIMEX INC., IWERKS ENTERTAINMENT, INC.

SIMEX-IWERKS MYRTLE BEACH, LLC

(the “**Applicants**”)

FACTUM OF THE APPLICANTS

(CCAA Initial Order Application returnable January 19, 2024)

January 18, 2024

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PART I – OVERVIEW

1. SimEx Inc. (“**SimEx**”), together with Iwerks Entertainment, Inc. (“**Iwerks**”) and SimEx-Iwerks Myrtle Beach, LLB (“**SIMB**”; and together with SimEx and Iwerks, the “**Applicants**”) operate a unique single business enterprise in the specialized “4D” motion rides and cinematic attractions space. They operate in the “theatre attractions” or “motion rides” space, and as such rely nearly exclusively on tourism.

2. The Applicants have suffered significant losses due to the COVID-19 pandemic (“**COVID**”) and associated lockdowns, as well as a slower-than-expected return to pre-COVID business levels. The Applicants had also invested in projects that have been delayed or terminated due to COVID. Such projects are either “on hold” or amount to costs “thrown away”.

3. As a result of the foregoing, the Applicants are experiencing a liquidity crisis and will be unable to satisfy go-forward obligations such as payroll, rent, and licensing fees without the protections afforded by the CCAA, including immediate access to interim funding. They have consulted with their senior secured lender, Royal Bank of Canada (“**RBC**”), and the proposed monitor, and have determined that an optimal outcome for all stakeholders will be best achieved by entering creditor protection under the *Companies’ Creditors Arrangement Act* (the “**CCAA**”).

4. The Applicants seek an initial order pursuant to the CCAA (the “**Initial Order**”) substantially in the form appended at Tab 2 of the Applicant’s Application Record, that, *inter alia*,

- (a) declares that each of the Applicants is a “debtor company” to which the CCAA applies;

- (b) grants a stay of proceedings in favour of the Applicants and its directors and officers for an initial period of 10 days (the “**Stay Period**”);
 - (c) appoints Deloitte Restructuring Inc. (“**Deloitte**”) as monitor of the Applicants (in such capacity, the “**Monitor**”);
 - (d) grants certain court-ordered charges necessary for the initial 10-day Stay Period, including the Administration Charge, D&O Charge and the DIP Lender’s Charge (*as defined herein*);
 - (e) approves an interim financing term sheet (the “**DIP Term Sheet**”) between the Applicants, as borrowers, and RBC, as interim lender (the “**DIP Lender**”); and, a DIP financing charge in the amount of USD \$600,000 (the “**DIP Lender’s Charge**”), subject to limited application during the initial Stay Period; and
 - (f) approve the proposed sales and investment solicitation process in respect of the business and assets of the Applicants (the “**SISP**”).
5. Without the relief in the Initial Order, including the provision of interim financing, the Applicants have insufficient cash to sustain operations through the week beginning January 22, 2024. In such circumstances, the Applicants will have no option but to cease operations to the detriment of its stakeholders.
6. The Applicants intend to return before the expiry of the initial 10-day Stay Period to seek an amended and restated initial order granting certain additional relief, including an extension of the Stay of Proceedings.

PART II – FACTS

7. The facts are set out in detail in the affidavit of Michael Needham, sworn January 17, 2024 (the “**Needham Affidavit**”).

The Affidavit of Michael Needham sworn January 16, 2024 (“Needham Affidavit”), Application Record of the Applicants dated January 17, 2024 (“Application Record”), Tab 2.

A. Corporate Structure and Business

8. The Applicants are part of a single business enterprise and each company is responsible for different functions.

9. SimEx is the parent company and directs all activities of the business enterprise. It is incorporated under the laws of Ontario. SimEx is the production, design and manufacturing arm of the enterprise, and primarily carries out 4D film production; attraction design, manufacturing & support; and, graphic design.

Needham Affidavit, Application Record, Tab 2, p. 5 para 16-18.

10. Iwerks is a wholly-owned subsidiary of SimEx, and is incorporated under the laws of the State of Delaware. Iwerks is the sales and service arm of the enterprise, and primarily carries out attraction co-ventures; licensing of 4D films; and, customer services. Iwerks is wholly reliant on SimEx to continue its business, as SimEx provides all equipment and films, and SimEx invoices Iwerks for the same.

Needham Affidavit, Application Record, Tab 2, p. 6 para 20-23.

11. SIMB is a wholly-owned subsidiary of Iwerks and is incorporated under the laws of the State of South Carolina. SIMB was incorporated in order to develop and independently operate

a specific licensed theatre attraction in Myrtle Beach, South Carolina called “The Simpsons in 4D”, which provides visitors with a 4D immersive movie and physical attraction experience based on “The Simpsons” cartoon series. SIMB relies wholly on SimEx for all attraction design services, equipment and film content, and SimEx invoices SIMB for the same

Needham Affidavit, Application Record, Tab 2, p. 7-8 at para 24-28.

12. SimEx has four (4) other subsidiaries - 6618391 Canada Inc., 6618359 Canada Inc., Cinema 4D Inc. and SimEx Santa’s Late Inc., that were each incorporated for specific film projects which have either been completed or have been aborted. They are inactive, have no assets, and are not applicants in these proceedings.

Needham Affidavit, Application Record, Tab 2, p. 8 at para 29.

13. The Applicants operate out of five leased facilities located in Canada and the US. They are in arrears under each of their leases.

Needham Affidavit, Application Record, Tab 2, p. 8 at para 30.

B. Employees

14. The Applicants employ seventy-six (76) employees: SimEx has forty-seven (47) full time employees; Iwerks has sixteen (16) full time employees; and SIMB has five (5) full time employees and eight (8) part time employees. None of the employees are unionized or otherwise subject to any collective bargaining agreement in connection with their employment with any Applicant.

Needham Affidavit, Application Record, Tab 2, p. 11 at para 41, 42.

15. The Applicants are current in respect of payroll. Unless all potential accounts are collected (unlikely), the Applicants will be unable to fund payroll for the week beginning

January 22, 2024 without access to interim DIP funding.

Needham Affidavit, Application Record, Tab 2, p. 11 at para 42.

16. The Applicants are operating at already-reduced staffing levels, and do not believe there is much room for reduction, if any, without risking the success of the SISP.

Needham Affidavit, Application Record, Tab 2, p. 12 at para 47.

C. Customers

17. The Applicants have a diverse set of customers. In the majority of cases, each film and project is the subject of a stand-alone agreement with the customer for one or more of the services the Applicants provide.

Needham Affidavit, Application Record, Tab 2, p. 12 at para 48.

D. Key Suppliers

18. The Applicants have lasting relationships with various film studios as suppliers of intellectual property. The dealings are either licensing of existing films or the creation of original licensed content – more often the former. Some key partners include Warner Brothers and Disney.

Needham Affidavit, Application Record, Tab 2, p. 12 at para 48.

E. Cash Management & Accounting

19. All finance and accounting of the business are directed by SimEx. The details of the Applicants specific banking are included in the Needham Affidavit.

Needham Affidavit, Application Record, Tab 2, p. 13 at para 51-52.

F. Assets

20. The consolidated book value of the Applicants' assets total approximately USD \$26,500,000. Of that, approximately USD \$4,500,000 represents current assets, and USD \$21,500,000 represents non-current assets.

Needham Affidavit, Application Record, Tab 2, p. 16 at para 61.

G. Liabilities

21. The Applicants' consolidated liabilities total USD \$29,600,000 consisting of approximately USD \$18,700,000 of current liabilities, and approximately USD \$10,800,000 of noncurrent liabilities.

Needham Affidavit, Application Record, Tab 2, p. 17 at para 63.

H. Creditors***Secured Creditors***

22. As of January 12, 2024, the Applicants have aggregate secured debt obligations of approximately USD \$16,100,000, due to RBC and BDC Capital Inc. ("**BDC Capital**"). RBC is the Applicants' senior secured creditor, holding a senior secured interest against the Applicants' assets, property and undertakings in Ontario and the US.

Needham Affidavit, Application Record, Tab 2, p. 18 at para 67.

23. SimEx executed an amended and restated loan agreement with RBC dated March 31, 2023 ("**RBC Loan Agreement**"), pursuant to which RBC provided four credit facilities to SimEx. As security for their obligations under the RBC Loan Agreement, the Applicants reaffirmed all existing first-ranking security granted to RBC (the "**RBC Security**").

24. The Applicants are jointly and severally indebted to RBC under the RBC Loan Agreement and secured by RBC in the approximate amounts of CAD \$6,757,555 and USD \$9,633,782.

Needham Affidavit, Application Record, Tab 2, p. 19 at para 69.

25. In addition to the RBC Loan Agreement, SimEx entered into a credit facility agreement with RBC in connection with the Business Development Bank of Canada's Highly Affected Credit Availability Program (the "**HASCAP Credit Agreement**") pursuant to which SimEx borrowed CAD \$1,000,000. SimEx's obligations under the HASCAP Credit Agreement are secured by the RBC Security.

Needham Affidavit, Application Record, Tab 2, p. 21 at para 73-74.

26. SimEx entered into a commitment letter with BDC Capital, amended on June 27, 2018, pursuant to which BDC Capital agreed to advance UD \$2,500,000 to SimEx in order to fund SimEx's construction of the Simpsons 4D theatre attraction in Myrtle Beach, South Carolina. In connection with the same, the Applicants executed various security documents in favour of BDC including guarantees and general security agreements. BDC Capital subordinated its security against the Applicants in favour of RBC pursuant to an intercreditor agreement.

Needham Affidavit, Application Record, Tab 2, p. 22 at para 80-81, 87.

Equipment Lessors

27. There are equipment lessors who have registrations against SimEx. However, the Applicants returned such equipment some time ago and are no longer obligated to such lessors. Such parties have been served with these materials out of an abundance of caution, but the Applicants believe this security registrations should be deleted.

Needham Affidavit, Application Record, Tab 2, p. 24 at para 83-85.

Unsecured Creditors

28. The Applicants have unpaid trade and other unsecured debt accrued in the normal course of business. As of January 12, 2024, the Applicants' accounts payable and accrued unsecured liabilities in excess of USD \$7,000,000.

Needham Affidavit, Application Record, Tab 2, p. 25 at para 92.

Demand

29. On January 12, 2024, RBC formally noted the Applicants in default and issued demand for repayment and notices of intention to enforce security under Section 244 of the Bankruptcy and Insolvency Act.

Needham Affidavit, Application Record, Tab 2, p. 22 at para 78.

30. RBC has nonetheless been supporting the Applicants and is prepared to provide interim financing to facilitate the Applicants CCAA Proceedings.

I. Urgent Need for CCAA Protection

31. As detailed in the Needham Affidavit, without interim financing the Applicants will be unable to operate in the ordinary course and payroll obligations will not be met. A more detailed discussion of the financial challenges leading to this stage are set out in the Proposed Monitor's Report dated January 18, 2024.

Report of Proposed Monitor, dated January 19, 2024 ("Pre-Filing Report"), at paras 37-43.

32. In consultation with their advisors and RBC, the Applicants have determined that the CCAA process is the most beneficial plan of action to maximize value for the Applicants' stakeholders.

33. The Applicants urgently need interim financing, and there is no reasonable prospect that

such financing can be achieved, or that the Applicants' financial condition will improve, without an insolvency proceeding.

J. Appointment of Monitor

34. The Applicants seek the appointment of Deloitte as Monitor in these CCAA proceedings. Deloitte has provided guidance and assistance in the commencement of these proceedings, and has assisted in the preparation of the cash flow projections.

K. Administration Charge

35. In order to protect the fees and expenses of the Applicants' legal counsel, the Proposed Monitor, and counsel to the Proposed Monitor (the "**Professionals Group**") throughout the CCAA proceedings, the Applicants ranking in priority to claims of all secured and unsecured creditors and the proposed Directors' Charge and Interim Financing Charge, as security for the reasonable fees and disbursements of the Professionals Group.

36. The Professionals Group will have extensive involvement during the CCAA proceedings, and they have contributed and will continue to contribute to the Applicants' restructuring efforts and will ensure that there is no unnecessary duplication of roles among them.

Needham Affidavit, Application Record, Tab 2, p. 27 at paras 103-105.

L. DIP Loan and DIP Lender's Charge

37. The Cash Flow Forecast demonstrates that the Applicants require an immediate injection of funds to enable them to carry-on business during the restructuring process. RBC has agreed to provide debtor-in-possession financing to the Applicants substantially in accordance with the DIP Term Sheet. Such financing is conditional upon the Court approving the DIP Term Sheet

and granting the DIP Lender's Charge.

Needham Affidavit, Application Record, Tab 2, p. 28 at paras 108-109.

38. The salient terms and conditions of the DIP Term Sheet are as follows:

- (a) a maximum principal amount of USD \$600,000 shall be made available under the DIP Term Sheet;
- (b) funding advanced under the DIP Term Sheet shall bear interest at a rate of RBUSBR + 2%;
- (c) advances under the DIP Term Sheet shall be made in response to written requests issued by the Applicants, provided that such request must (i) supported by the Proposed Monitor and (ii) in accordance with the Cash Flow Forecast (and any revised forecast);
- (d) any funding request representing any major deviation from the established cash flow forecast or as a result of an extraordinary event shall require the consent of RBC;
- (e) the DIP Terms Sheet is conditional on the Court approving and authorizing the same and granting a super-priority DIP Lender's Charge against the assets, property and undertakings of the Applicant to secure all obligations of the Applicants under the DIP Term Sheet, which shall rank subordinate only the Administration Charge (*as defined below*), but in priority to all other claims and encumbrances.; and
- (f) the DIP Term Sheet shall mature and be fully repayable upon, *inter alia*, default, in the event the stay of proceedings under the CCAA is lifted without the DIP Lender's

consent, which shall not be unreasonably withheld; or, the proceedings under the CCAA are terminated.

Needham Affidavit, Application Record, Tab 2, p. 28 at para 109.

39. The above terms are consistent with prevailing practices in insolvency proceedings. The DIP Lender's Charge will rank in priority ahead of all other claims, but behind the Administration Charge.

M. Directors' and Officers' Charge

40. As part of these proceedings, in order to ensure the ongoing stability of the Applicants, they are seeking a super-priority D&O Charge over all of the assets, property and undertakings of the Applicants up to a maximum amount of USD \$300,000 to secure their obligation to indemnify the directors against certain claims. Such amount is based on three weeks of Canadian payroll costs and two weeks of American payroll costs. The D&O Charge will be limited to USD \$230,000 during the initial Stay Period.

Needham Affidavit, Application Record, Tab 2, p. 31 at paras 114-118.

N. SISP

41. Given the severely underfunded nature of the Applicants, to maximize its chance of a successfully SISP, the same must begin immediately following the granting of the Initial Order. The Applicants are seeking approval of the SISP in the Initial Order, but the activities during the initially Stay Period will be limited to preparation of diligence materials and identification of potentially interested parties.

Needham Affidavit, Application Record, Tab 2, p. 32 at para 120.

42. The salient terms of the SISP are as follows:

- (a) immediate preparatory steps following the issuance of the Initial Order, including identification of potentially interested investors and potentially interested purchasers;
- (b) an active, public launch of the process immediately following the issuance of the ARIIO;
- (c) solicitation of interest on an “as is, where is” basis;
- (d) a forty-five (45) day period for marketing and due diligence;
- (e) a target offer/bid deadline of March 14, 2024;
- (f) a potential auction where there appropriate;
- (g) negotiation of a final successful offer; and
- (h) Court approval of the successful offer, recommended by the Monitor, and closing;

Needham Affidavit, Application Record, Tab 2, p. 32 at para 121.

PART III - ISSUES

43. The issues on this Application are whether:
- (a) the Applicants are debtor companies to which the CCAA applies;
 - (b) the Stay of Proceedings should be granted in respect of the Applicants;
 - (c) the Monitor should be appointed;
 - (d) the Court should approve the DIP Term Sheet and grant the DIP Lender’s Charge

sought in favour of the DIP Lender; and,

(e) the Court should grant the Administration Charge and the D&O Charge?

44. The Applicants submit the answer to each of the foregoing is – *yes*.

PART IV - LAW AND ARGUMENT

A. Each of the Applicants is a “debtor company” to which the CCAA Applies

45. Section 9(1) of the CCAA provides that a debtor company may apply for protection under the CCAA in the province where its head office or chief place of business in Canada is situated.

Companies’ Creditors Arrangement Act, R.S.C. 1985 c. C-36, as amended (“CCAA”); [CCAA, s. 9\(1\)](#).

46. The CCAA applies to a “debtor company” or “affiliated debtor companies” whose liabilities against the debtor or its affiliates exceed \$5 million.

[CCAA, s. 3.](#)

47. In order for the CCAA to apply, the debtor company must also be insolvent under the definition of “insolvent person” set out in the BIA:

“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.

[CCAA, s. 2\(1\)](#).

48. The test for insolvency is disjunctive. The definition of insolvency under the CCAA has been expanded by this Court to include circumstances where a corporation is financially troubled and expected to run out of liquidity within a reasonable proximity of time as compared to the time needed to implement a restructuring.

Inc., Re, 2004 CanLII 24933 (ON SC), [para. 26](#); *Re Just Energy Corp.*, [2021 ONSC 1793](#).

49. The Applicants qualify as debtor companies under the CCAA.

- (a) The head office of the Applicants, along with senior management and enterprise accounting, is located in Ontario, Canada.
- (b) The Applicants are affiliates operate as a single business enterprise and are affiliated debtor companies as that term is defined in the CCAA.
- (c) The claims against the Applicants far exceed \$5 million.
- (d) The Applicants are insolvent, as they are each unable to meet their obligations as they become due. Without the DIP Facility, each of the Applicants will be unable to make payroll or pay normal course obligations commencing the week of January 22, 2024.

Needham Affidavit, Application Record, Tab 2, p. 11 at para 42.

50. Accordingly, it is appropriate that the Court make a declaration that Applicants are debtor companies to which the CCAA applies.

B. The Stay of Proceedings Should be Granted

51. Section 11.02(1) of the CCAA provides that the Court may order a stay of proceedings

on an initial CCAA application for a period of not more than 10 days, provided that the stay is appropriate and that the Applicant is acting with due diligence and in good faith. The Court may extend the stay to the directors and officers of a debtor company.

[CCAA, ss. 11.02, 11.03.](#)

52. The Company is seeking an initial Stay Period of 10 days until the return of the comeback motion on a date to be scheduled by the Court (the “**Comeback Hearing**”). The Stay Period is necessary to provide the Company with the breathing room and stability to organize its affairs, consult with stakeholders and creditors without the threat of enforcement, access the DIP Facility, and to lay the groundwork for a viable SISP to facilitate the continuation of the business enterprise as a going concern.

53. In deciding whether to grant CCAA protection to a debtor company, courts have taken into consideration the remedial purpose of the CCAA, which is to avoid the social and economic losses resulting from the liquidation of an insolvent company. In this case, there are 76 employees throughout the US and Canada that the Court should take into account when considering the underlying purpose of the CCAA.

54. The Applicants require a Stay of Proceedings to protect the status quo and to facilitate the SISP, which will create multiple paths to see the business enterprise survive via one or more investment or sale transactions. The business is most valuable as a going-concern. A shut-down liquidation is unlikely to result in any meaningful realization for creditors and stakeholders; and would result in the loss of value and jobs to the detriment of all.

55. In addition to the foregoing, the Applicants have acted diligently and in good faith with RBC and Deloitte to prepare this filing and SISP strategy. Accordingly, the stay of proceeding sought in the circumstances is appropriate.

C. The Court Should Appoint Deloitte as Monitor

56. The Applicants propose the appointment of Deloitte as Monitor.

57. Deloitte is a licensed “trustee” within the meaning of subsection 2(1) of the BIA, is not subject to any of the restrictions set out in section 11.7(2) of the CCAA and has consented to act as Monitor. Deloitte has extensive experience acting as a court-appointed monitor in CCAA proceedings and is familiar with the Applicants’ affairs.

[CCAA, s. 11.7; BIA, s. 2, definition of “trustee”.](#)

Deloitte Consent, Exhibit Q of the Needham Affidavit, Application Record, Tab 2Q Lydian International Limited (Re), 2019 ONSC 7473 [Morawetz C.J.] (“Lydian”), para. 40.

D. The Court Should Approve the DIP Facility and Grant the DIP Lender’s Charge

58. The Applicants have secured the interim financing necessary to meet its cash flow obligations during the first 10 days of the CCAA proceeding and beyond. It seeks a DIP Lender’s Charge in favour of RBC in the amount of \$200,000 for the first 10-day period, with a maximum amount of \$600,000 thereafter.

59. This Court has jurisdiction under s. 11.2 of the CCAA to approve an interim financing facility and to grant a priority charge in favour of a lender in an amount that the Court considers appropriate, having regard to the company’s cash-flow statement. The CCAA expressly provides that the charge may rank in priority to the claims of any other creditor.

[CCAA, s. 11.2\(1\) and \(2\).](#)

60. Section 11.2(4) of the CCAA establishes the following non-exhaustive criteria for the Court to consider in deciding whether to grant the DIP Lender’s Charge:

- (a) the period during which the applicant is expected to be subject to CCAA proceedings;
- (b) how the applicant's business and financial affairs are to be managed during the proceedings;
- (c) whether the applicant 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, the nature and value of the applicant's property;
- (e) whether any creditor would be materially prejudiced as a result of the security or charge; and
- (f) whether the Monitor supports the charge.

[CCAA, s. 11.2\(4\).](#)

61. Section 11.2(1) of the CCAA provides that notice must be given to secured creditors likely to be affected by the charge and that the charge may not secure an obligation that existed before the order is made.

[CCAA, s. 11.2\(1\).](#) See *Canwest Publishing Inc*, 2010 ONSC 222 [Pepall J.] (“*Canwest 2010*”), [paras. 42-44.](#)

62. In addition, section 11.2(5) of the CCAA provides that where an interim financing charge is sought for the initial 10-day stay period, no order shall be made approving the charge unless the Court is satisfied that the terms of the loan are limited to what is reasonably necessary for the continued operation of the debtor company in the ordinary course of business during that period.

[CCAA s. 11.2\(5\)](#)

63. The Applicants urgently require interim financing to operate. The Applicants are unable to meet immediate cash needs, which will force them to cease operations, which would diminish realizable value and disrupt the provision of its services to its customers and vendors.

Needham Affidavit, Application Record, Tab 2, p. 30 at paras 111.

Cash Flow Forecast (“Cash Flow”), Exhibit H of the Needham Affidavit, Application Record, Tab 2H

Pre-Filing Report, at paras 44-50.

64. The terms of the DIP Facility are fair and reasonable, and comparable to other interim facilities approved in Ontario and elsewhere in Canada. In addition, the Initial Order provides that the DIP Lender’s Charge will not secure any obligation that existed prior to the Initial Order. Deloitte, in its role as the proposed Monitor, is supportive of the DIP Facility and the quantum of the DIP Lender’s Charge as limited by the terms of the proposed initial order.

Pre-Filing Report, at paras 53-55 and a paras 73-77.

65. In view of the foregoing, approval of the DIP Term Sheet and granting of the DIP Lender’s Charge is appropriate in the circumstances.

E. The Court Should Grant the Other Court-ordered Charges

66. A debtor appearing at an initial application hearing may seek relief pursuant to the court’s broad jurisdiction under s. 11 of the CCAA. Section 11.001 of the CCAA provides that an order granted on an initial application must be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during the initial 10-day stay period.

[CCAA, s. 11.](#)

[CCAA, s. 11.001.](#)

67. In considering what relief was appropriate at an initial hearing, Chief Justice Morawetz held in *Lydian* that wherever possible, the status quo should be maintained during the first 10-day period. Since the enactment of s. 11.001, courts have granted various relief on first day applications to preserve the status quo, including the approval of significant amounts of interim

financing and corresponding charges, administration charges, and directors' and officers' charges.

Lydian, supra, [para. 26](#).

See, for example, *Target Canada Co. (Re)*, 2015 ONSC 303, [para. 81](#).

The Court Should Grant the Administration Charge

68. The Applicants request a first priority charge in favour of the Professionals Group. The quantum of the Administration Charge sought on the application is \$500,000, but limited by the terms of the proposed initial order to \$390,000 during the initial Stay Period.

69. The above-noted limited amount is what the Company, in consultation with the Deloitte as proposed Monitor, determined is required to secure the cost of expended and expected professional time and through the end of the initial 10-day Stay Period.

Needham Affidavit, Application Record, Tab 2, p. 27 at para 104.

Pre-Filing Report, at paras 73-77.

70. The Court has express jurisdiction to grant the Administration Charge under s. 11.52 of the CCAA. Section 11.52 requires that notice be given to the secured creditors who are likely to be affected by the charge and that the charge is limited to an amount that the court considers appropriate.

[CCAA, s. 11.52](#).

71. Courts have considered the following non-exhaustive factors in determining whether an administration charge is appropriate:

- (a) the size and complexity of the business 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.

See *Canwest 2010*, [para. 54](#). See also *Laurentian, supra*, [paras. 49-50](#); *Lydian, supra*, [paras. 46-47](#).

72. In considering the factors under the CCAA, the proposed Administration Charge is necessary and appropriate under the circumstances. The secured parties likely to be affected have been served. The proceeding will include complexities given the cross border nature of the business enterprise. The Professionals Group has had and will continue to have extensive involvement and contributions to the CCAA proceedings. The Professionals Group will ensure that there is no unnecessary duplication of roles among them. RBC, the senior secured creditor, supports the charge, as does the proposed Monitor.

Needham Affidavit, Application Record, Tab 2, p. 27 at para 104.

Pre-Filing Report, at paras 73-77.

73. An administration charge is considered fair and reasonable where its quantum is not, on a balance, disproportionate to the complexity of the business and restructuring. The size of the charge was determined with the assistance of Deloitte. The Administration Charge of USD \$390,000 during the initial Stay Period, and USD \$500,000 in aggregate is reasonable and proportionate under the circumstances.

See *Canwest Global Communications Corp. (Re)*, 2009 CanLII 55114 (ON SC) [Pepall J.] (“*Canwest 2009*”), [para. 40](#);

Needham Affidavit, Application Record, Tab 2, p. 27 at para 106.

Pre-Filing Report, at paras 73-77.

The Court Should Grant the D&O Charge

74. The Company seeks a court-ordered charge, in the maximum amount of USD \$300,000, with only USD \$290,000 during the initial Stay Period, to secure the Applicants' indemnity to their Directors and Officers and directors (the "D&O Charge"), to the extent such liability is not covered under the Applicants' director's insurance policy (the "D&O Policy").

75. The above-noted limited amount is what the Company, in consultation with the Deloitte as proposed Monitor, determined is required to secure the potential payroll liabilities through the end of the initial 10-day Stay Period.

Needham Affidavit, Application Record, Tab 2, p. 27 at para 104.

Cash Flow, Exhibit H of the Needham Affidavit, Application Record, Tab 2H

76. Section 11.51 of the CCAA provides express authority for the Court to grant charges in favour of directors and officers in the amount that the Court considers appropriate in the circumstances.

[CCAA, s. 11.51.](#)

77. In *Jaguar Mining*, the Court identified four factors to be satisfied in granting a director and officers' charge:

- (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 or officer at a reasonable cost; and
- (d) the charge does not apply in respect of any obligation incurred by a director or officer as a result of the director's or officer's gross negligence or willful misconduct.

***Jaguar Mining Inc. (Re)*, 2014 ONSC 494, [para. 45.](#) [CCAA, s. 11.51\(3\).](#)**

78. The above-noted factors are all satisfied in this case. The Applicants D&O Policy has exclusions and exceptions to such coverage, and obtaining additional coverage during a CCAA proceeding is likely prohibitively difficult and expensive, if at all possible. The Applicants have provided notice to its secured creditors.

79. The amount of the D&O Charge sought in the Initial Order is appropriate. The Initial Order limits the quantum of the D&O Charge during the initial Stay Period to three weeks of Canadian payroll costs and two weeks of American payroll costs. The Initial Order expressly provides that the D&O Charge does not apply in respect of any pre-filing claims, gross negligence or willful misconduct. No amounts for environmental or other health and safety liability have been included in the D&O Charge.

Pre-Filing Report, at paras 78-82.

80. The Applicants' directors and officers are familiar with the Applicants' Business and industry workings. The continued operation of the business would be impossible without the involvement and knowledge of the directors and officers.

F. The Court Should Approve the SISP

81. The Court has discretion under the CCAA to approve a sale and investment solicitation on such terms as it deems appropriate and necessary. Approval of such processes are common practice, informed by the circumstance of each debtor and proceeding, and the recommendations of the subject monitor.

82. In this case, the proposed SISP is the driving factor behind these proceedings. The business enterprise is inherently more valuable as a going concern and, for this reason, the proposed SISP will provide the market with an opportunity to invest in or acquire the entire

business enterprise, for the benefit of all creditors. The SISP was developed in consultation with Deloitte as proposed Monitor. RBC, a senior secured creditor, not only supports the SISP, it is funding the same.

83. Additionally, the SISP contemplates starting immediately after the granting of the Initial Order but only for the purposes of preparatory steps leading up to the public “launch” following the Comeback Hearing, assuming the stay is extended at such hearing. This will enable the SISP to run for the longest active period, taking into account the funding limitations.

84. In view of the above, the Applicants believe the SISP represents the best possible path forward for the Applicants and should be approved.


Pre-Filing Report, at paras 62-64.

[CONTINUED ON NEXT PAGE]

PART V - RELIEF REQUESTED

85. The Applicants therefore seeks an Initial Order in the form of the suggested draft order, filed as Tab 1A of the Application Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 18th day of January, 2024.



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**SCHEDULE A – LIST OF
AUTHORITIES**

1. *Stelco Inc., Re*, [2004 CanLII 24933 \(ON SC\)](#)
2. *Re Just Energy Corp.*, [2021 ONSC 1793](#)
3. *Laurentian University of Sudbury*, [2021 ONSC 659](#)
4. *Lydian International Limited (Re)*, [2019 ONSC 7473](#)
5. *Canwest Publishing Inc.*, [2010 ONSC 222](#)
6. *Target Canada Co. (Re)*, [2015 ONSC 303](#)
7. *Canwest Global Communications Corp. (Re)*, [2009 CanLII 55114 \(ON SC\)](#)
8. *Jaguar Mining Inc. (Re)*, [2014 ONSC 494](#)

SCHEDULE B – RELEVANT STATUTES

Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3:

Definitions

2 In this Act,

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;

trustee or licensed trustee means a person who is licensed or appointed under this Act.

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.

(2) Where a notice is required to be sent under subsection (1), the secured creditor shall not enforce the security in respect of which the notice is required until the expiry of ten days after sending that notice, unless the insolvent person consents to an earlier enforcement of the security.

(2.1) For the purposes of subsection (2), consent to earlier enforcement of a security may not be obtained by a secured creditor prior to the sending of the notice referred to in subsection (1).

(3) This section does not apply, or ceases to apply, in respect of a secured creditor

- (a) whose right to realize or otherwise deal with his security is protected by subsection 69.1(5) or (6); or
- (b) in respect of whom a stay under sections 69 to 69.2 has been lifted pursuant to section 69.4.

(4) This section does not apply where there is a receiver in respect of the insolvent person.

Companies' Creditors Arrangement Act, R.S.C., 1985, c. C-36: -

Definitions

2 (1) In this Act,

company means any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province, any incorporated company having assets or doing business in Canada, wherever incorporated, and any income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the Bank Act, telegraph companies, insurance companies and companies to which the Trust and Loan Companies Act applies;

court means

(a.1) in Ontario, the Superior Court of Justice

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;

initial application means the first application made under this Act in respect of a company;

Application

3 (1) This Act applies in respect of a debtor company or affiliated debtor companies if the total of claims against the debtor company or affiliated debtor companies, determined in accordance with section 20, is more than \$5,000,000 or any other amount that is prescribed.

(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.

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

companies if

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

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

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

Jurisdiction of court to receive applications

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

(2) The powers conferred by this Act on a court may, subject to appeal as provided for in this Act, be exercised by a single judge thereof, and those powers may be exercised in chambers during term or in vacation.

Form of applications

10 (1) Applications under this Act shall be made by petition or by way of originating summons or notice of motion in accordance with the practice of the court in which the application is made.

(2) An initial application must be accompanied by

- (a) a statement indicating, on a weekly basis, the projected cash flow of the debtor company;
- (b) a report containing the prescribed representations of the debtor company regarding the preparation of the cash-flow statement; and
- (c) copies of all financial statements, audited or unaudited, prepared during the year before the application or, if no such statements were prepared in that year, a copy of the most recent such statement.

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

11.01 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.

(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.

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

Stays — directors

11.03 (1) An order made under section 11.02 may provide that no person may commence or continue any action against a director of the company on any claim against directors that arose before the commencement of proceedings under this Act and that relates to obligations of the company if directors are under any law liable in their capacity as directors for the payment of those obligations, until a compromise or an arrangement in respect of the company, if one is filed, is sanctioned by the court or is refused by the creditors or the court.

(2) Subsection (1) does not apply in respect of an action against a director on a guarantee given by the director relating to the company's obligations or an action seeking injunctive relief against a director in relation to the company.

Interim financing

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

(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.

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.

(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.

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.

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

Court to appoint monitor

11.7 (1) When an order is made on the initial application in respect of a debtor company, the court shall at the same time appoint a person to monitor the business and financial affairs of the company. The person so appointed must be a trustee, within the meaning of subsection 2(1) of the *Bankruptcy and Insolvency Act*.

(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).

Good faith

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SIMEX INC., IWERKS ENTERTAINMENT, INC., SIMEX-IWERKS MYRTLE BEACH, LLC

Court File No.: CV-24-00713128-0000

ONTARIO
SUPERIOR COURT OF JUSTICE
[COMMERCIAL LIST]

Proceedings commenced at Toronto

Factum of the Applicants
(returnable January 19, 2024)

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