

**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 2607380 ONTARIO INC.**

Applicant

**FACTUM OF THE APPLICANT  
(For the Comeback Motion)  
(Returnable March 6, 2020)**

March 5, 2020

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PART I - OVERVIEW

1. The Applicant is in the business of the development and operation of the Nuvo Building located at 1295 North Service Road, Burlington, Ontario. The Nuvo Building is a multi-purpose commercial building that provides businesses with office space, film and television studios, and corporate and personal event space.
2. On February 25, 2020, the Applicant sought and obtained the Initial Order under the *Companies' Creditors Arrangement Act*<sup>1</sup> due to its inability to access the liquidity necessary to complete its planned renovations at the Nuvo Building and its subsequent default with respect to certain of its obligations. Richter Advisory Group Inc. was appointed as Monitor in these CCAA Proceedings.
3. Capitalized terms used herein but not otherwise defined have the meanings ascribed to them in the Affidavit of Shawn Saulnier sworn March 4, 2020 (the "**Saulnier Comeback**

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<sup>1</sup> RSC 1985, c C-36 [CCAA].

**Affidavit**") and the Affidavit of Shawn Saulnier sworn February 24, 2020 (the "**Initial Saulnier Affidavit**").

4. This factum is filed in support of a motion by the Applicant seeking an Amended and Restated Initial Order providing for certain amendments to the Initial Order, including:

- (a) provisions expanding the Applicant's restructuring capabilities within the CCAA Proceedings, expanding the Monitor's powers and protections;
- (b) approving the Meridian DIP Agreement between the Applicant and Meridian, pursuant to which the Applicant will obtain access to and be authorized to borrow under the DIP Facility in the maximum amount of \$7.18 million, which is to be secured by the DIP Charge;
- (c) increasing the Administration Charge to \$300,000;
- (d) declaring that Maple Reinders and Barrie Glass (collectively, the "**Contractors**") are "critical suppliers" as per s. 11.4 of the CCAA and authorizing the Applicant to make pre-filing payments in the aggregate amount of \$2,375,000 to the Contractors; and
- (e) extending the Stay Period in respect of the Applicant and the other stay parties to October 24, 2020.

## **PART II - THE FACTS**

5. The facts with respect to this application are more fully set out in the Saulnier Comeback Affidavit, Initial Saulnier Affidavit, and the First Report of the Monitor dated March 5, 2020.

6. For greater certainty, all references to currency in this factum are references to Canadian dollars.

## **A. BACKGROUND**

7. The Applicant's request for relief under the CCAA was triggered by an inability to access funds to complete the renovations at the Nuvo Building, which delayed the Applicant's anticipated increase in rental income at the Nuvo Building. The Applicant, in turn, experienced a liquidity crisis that saw the Applicant default on many of its obligations and ultimately resulted in the Applicant's general contractor, Maple Reinders, pausing all construction at the Nuvo Building in September 2019.

Initial Saulnier Affidavit at paras 68-76, Applicant's Motion Record, Tab 2 - Exhibit "A".

Saulnier Comeback Affidavit at para 6, Applicant's Motion Record, Tab 2.

## **B. THE STATUS OF THESE CCAA PROCEEDINGS**

8. Since the commencement of these CCAA Proceedings, the Applicant has continued to carry on business in the ordinary course. The Applicant's main focus in the ten-day period following the granting of the Initial Order was the stabilisation of its business and the development of a restructuring strategy. Among other things, the Applicant and the Monitor have taken various steps to advance these CCAA Proceedings, including the following:

- (a) publishing and forwarding notices as required under the CCAA;
- (b) meeting with Maple Reinders to understand the cost to complete the Nuvo Building's renovations and the timeline for completion;
- (c) continuing to administer the leases at the Nuvo Property in the ordinary course; and
- (d) preparing an updated cash flow forecast.

Saulnier Comeback Affidavit at para 10, Applicant's Motion Record, Tab 2.

First Report of the Monitor at paras 10-12.

9. The Applicant has also had the opportunity during the initial Stay Period to discuss potential paths forward with Meridian, its first-ranking secured creditor. These discussions have culminated in securing financial support for the balance of the Nuvo Building's renovation costs through the continuation of these CCAA Proceedings.

First Report of the Monitor at para 17.

10. Going forward, the principal purpose of these CCAA Proceedings is the completion of the Nuvo Building's renovations and, if approved by this Court, seeking a strategic investor or buyer for the Nuvo Property through a court-supervised sale or investment solicitation process for the benefit of the Applicant's creditors and other stakeholders, while also providing the Applicant time to seek a refinancing of its secured debt.

First Report of the Monitor at para 4.

Initial Saulnier Affidavit at paras 8 and 98, Applicant's Motion Record, Tab 2  
- Exhibit "A".

### **C. BENEFITS OF THE CCAA PROCESS**

11. The Applicant believes that continuation of the CCAA process approved by this Court on February 25, 2020 is the most appropriate process to minimize disruptions with respect to both the Applicant as well as its numerous tenants (and their operating businesses) while renovations are completed. A debtor-in-possession process provides the Applicant's tenants with greater stability and the knowledge that the construction will be completed on an expedited timeframe.

Saulnier Comeback Affidavit at para 32, Applicant's Motion Record, Tab 2.

### **D. THE MERIDIAN DIP AGREEMENT**

12. At the initial hearing, the Applicant sought the approval of DIP financing to be provided by a third-party lender. An initial advance was provided for in the proposed DIP to assist the Applicant through the initial Stay Period.

First Report of the Monitor at para 34.

Initial Saulnier Affidavit at paras 124-126, Applicant's Motion Record, Tab 2 - Exhibit "A".

13. Instead, pursuant to the Initial Order, Meridian agreed to provide the Applicant with \$220,000 in interim financing for the ten-day period following the granting of the Initial Order.

First Report of the Monitor at paras 2 and 36-37.

14. Since the granting of the Initial Order, Meridian and the Applicant have negotiated and agreed to the Meridian DIP Agreement. Under the Meridian DIP Agreement, the Applicant will have access to funds provided by Meridian via the DIP Facility to a maximum of \$7.18 million. The DIP Facility is expected to provide the Applicant with the liquidity necessary through to October 24, 2020, the end of the proposed Stay Period extension.

Saulnier Comeback Affidavit at para 21, Applicant's Motion Record, Tab 2.

15. The DIP Facility will be used to, among other things, enable the Applicant to complete the renovations of the Nuvo Building. The DIP Facility will be secured by the super-priority DIP Charge ranking behind a \$300,000 Administration Charge.

Saulnier Comeback Affidavit at paras 21-22, Applicant's Motion Record, Tab 2.

### **PART III - ISSUES**

16. The issues before this Court, as addressed below, are whether:
- (a) the present circumstances are best addressed by a proceeding under the CCAA;
  - (b) the restructuring- and Monitor-related provisions in the Amended and Restated Initial Order should be granted;

- (c) the Administration Charge should be increased to \$300,000;
- (d) the Meridian DIP Agreement, the DIP Facility (and the Applicant's ability to borrow thereunder) and the DIP Charge should be approved;
- (e) the Contractors should be declared critical suppliers and paid the pre-filing amounts owing to them to ensure that the renovations are completed on an expedited basis; and
- (f) the Stay Period should be extended to October 24, 2020.

#### PART IV - THE LAW

##### A. THESE CCAA PROCEEDINGS ARE PREFERABLE TO A RECEIVERSHIP

17. The third ranking secured creditor, Bridging, seeks to terminate the CCAA Proceedings to replace them with a receivership. Such relief is not appropriate. The Applicants, the first ranking secured creditor, the DIP Lender and the Monitor support the continuation of the CCAA Proceedings.

18. Bridging served its materials at 1:46 p.m. on the date before the Comeback Motion. The Applicant and the Monitor are reviewing its materials and will consider if any responding materials are required; but for the assistance of the Court, the Applicant wanted to file this factum before end of Court hours.

19. It is well recognized that the purpose of the CCAA is to maintain the *status quo* to provide a structured environment in which an insolvent company can continue to carry on business and develop a restructuring plan for the benefit of the company and all of its stakeholders. The stay of proceedings imposed during the CCAA process is intended to

provide a CCAA debtor with breathing room in order to prevent any creditor from taking advantage over other creditors while the company is attempting to reorganize its affairs.

*Ted Leroy Trucking [Century Services] Ltd, Re*, 2010 SCC 60, BOA Tab 1

20. When faced with competing CCAA and receivership applications, the Court often considers the statutory and practical considerations of each option, taking into account the following factors, among others:

- (a) operational issues pertaining to the competing applications and the feasibility of each restructuring plan;
- (b) the nature of the property at issue;
- (c) the interests of the secured creditors; and
- (d) the interests of other stakeholders.

See generally *Forest & Marine Financial Corp, Re*, 2009 BCCA 319 [*Forest & Marine*], BOA Tab 2; *Pacific Shores Resort & Spa Ltd, Re*, 2011 BCSC 1775, BOA Tab 3.

21. For the reasons outlined below, the continuation of these CCAA Proceedings is preferable to a receivership.

**i. The Applicant Has a Viable Business and a Realistic Plan**

22. The Applicant has the foundation for a reasonable and realistic restructuring plan. As mentioned above, the focus during these CCAA Proceedings is the completion of the Nuvo Building's renovations. Upon completing these renovations, the Applicant's liquidity and enterprise value is projected to significantly improve, which will in turn maximize value for the benefit of the Applicant and its stakeholders. The timeline to do so, with the support of the DIP Facility, is now certain and achievable- construction is set to be completed on or before September 30, 2020.



First Report of the Monitor at para 13.

23. Where a debtor has a viable business and a realistic plan that will enable it to remain in business to the benefit of all concerned, a CCAA proceeding is preferable to alternative proceedings. To this point, the British Columbia Court of Appeal wrote the following in deciding that it was appropriate for a CCAA process to continue over the objections of a creditor:

[...] Here, the main debtor, the Partnership, is at the centre of a complicated corporate group and carries on an active financing business that it hopes to save notwithstanding the current economic cycle. (The business itself, which fills a "niche" in the market, has been carried on in one form or another since 1983.) The CCAA is appropriate for situations such as this where it is unknown whether the "restructuring" will ultimately take the form of a refinancing or will involve a reorganization of the corporate entity or entities and a true compromise of the rights of one or more parties. The "fundamental purpose" of the Act - to preserve the *status quo* while the debtor prepares a plan that will enable it to remain in business to the benefit of all concerned - will be furthered by granting a stay so that the means contemplated by the Act - a compromise or arrangement - can be developed, negotiated and voted on if necessary. If the Partnership is ultimately able to arrange a refinancing in respect of which creditors need not compromise their rights, so much the better. At this point, however, it seems more likely a compromise will be necessary and the Partnership must move promptly to explore all realistic restructuring alternatives.

*Forest & Marine* at para 26, BOA at Tab 2.

24. Despite the Applicant's current liquidity concerns, it has an on-going business and its underlying business model is viable. This is proven by the Applicant's ability to generate \$208,506 in event income and \$2,370,321 in rental income in 2019. Rental income is expected to increase upon the completion of the Nuvo Building's renovations.

Initial Saulnier Affidavit at para 20, Applicant's Motion Record, Tab 2 - Exhibit "A".

25. The viability of the Applicant's business is further supported by the level of demand for space in the Nuvo Building. The Food Network, for example, has already signed a lease for space that is currently being renovated in the Nuvo Building.

Saulnier Comeback Affidavit at para 16, Applicant's Motion Record, Tab 2.

26. Further, there is already significant equity in the Nuvo Property. Indeed, the realizable value of the Nuvo Property greatly exceeds the Applicant's obligations to its lenders and as such the Applicant's creditors will experience no practical harm if these CCAA Proceedings are allowed to continue.

Initial Saulnier Affidavit at para 35, Applicant's Motion Record, Tab 2 - Exhibit "A".

First Report of the Monitor at para 13.

**ii. The Nature of the Applicant's Business is Suitable for a CCAA Process**

27. Although the Applicant is not merely a real estate development company, it is important to note that Courts have granted such companies CCAA protection on numerous occasions, including subsequent to the CCAA amendments which came into force on November 1, 2019.

*Re Forme Development Group Inc et al* (30 November 2018), Toronto CV-18-608313-00CL (ONSC) (initial CCAA order) at paras 16 and 18, BOA at Tab 4.

*Re Medican Holdings Ltd et al* (26 May 2010), Calgary 1001-07852 (ABQB) (initial CCAA order), BOA at Tab 5; *Re Medican Holdings Ltd et al* (25 May 2010), Calgary 1001-07852 (ABQB) (affidavit of Wesley Reinheller) at paras 77-79, BOA at Tab 6.

28. The Applicant provides local businesses and individuals with commercial, studio and event spaces. The lease agreements between the Applicant and its tenants are, in many cases, different from standard commercial leases. The premises being rented by many tenants, for example, are shared workspaces or "hot desks" rather than defined spaces for the exclusive enjoyment of the tenant. This unique arrangement requires that the Applicant provide its

tenants with enhanced services, including access to food and drinks, printing and more. In other words, the Applicant is actively involved in hosting tenants at the Nuvo Building. It is not a passive landlord merely collecting rent. Similarly, the Applicant is not a single-project property development company. The Applicant's primary business function is hosting tenants at the Nuvo Building, as described above. The Nuvo Building's renovations were not undertaken as part of a grander scheme to improve the Nuvo Property and sell it at a profit; rather, the renovations were undertaken so that the Applicant could create more usable space and enhance its tenants' experience.

Initial Saulnier Affidavit at paras 23 and 24, Applicant's Motion Record, Tab 2- Exhibit "A".

Saulnier Comeback Affidavit at para 15, Applicants' Motion Record, Tab 2.

**iii. The Applicant Has the Support of its Largest and Most Senior Creditor**

29. The Applicant's first-ranking secured creditor, Meridian, is supportive of these CCAA Proceedings. Meridian holds approximately \$17.3 million of the Applicant's debt, that being roughly six times the amount held by Bridging.

Initial Saulnier Affidavit at paras 41 and 47, Applicant's Motion Record, Tab 2 - Exhibit "A".

30. It is not just and convenient for this Court to appoint a receiver at the behest of Bridging without the support of Meridian. In *Computershare*, for example, the Supreme Court of British Columbia refused to appoint a receiver in part because it was not just and convenient to appoint a receiver on the request of a first-ranking secured creditor when the second-ranking secured creditor, who held six times as much debt as the first-ranking secured creditor, objected to a receivership.

*Computershare Trust Company of Canada v Meadows Development Ltd*, 2019 BCSC 1945 at paras 14, 16 and 21, BOA Tab 7.

31. Bridging is also subject to a Standstill Agreement with Meridian and CCCI which prohibits these enforcement actions. Bridging and CCCI were aware that construction and financing costs would continue to be incurred under the Meridian Facility, and as such the relative priorities are not being altered by these CCAA Proceedings.

Initial Saulnier Affidavit at para 118, Applicant's Motion Record, Tab 2 - Exhibit "A".

**iv. Stakeholder Interests Are Better Protected in These CCAA Proceedings**

32. The Applicant directly employs nine employees and eight independent contractors. Many of these individuals hold high-skilled jobs including client services, finance, IT, human resources. These individuals would be at risk of being terminated in a receivership.

Initial Saulnier Affidavit at para 11, Applicant's Motion Record, Tab 2 - Exhibit "A".

33. Further, the Applicant has numerous tenants. A receivership introduces instability and uncertainty into the landlord-tenant relationship, which could have long-lasting and detrimental consequences that results in tenants leaving the Nuvo Building. Future tenants such as the Food Network may also be disinclined to move into the Nuvo Building if it is subject to a receivership.

34. Completing construction with alternative contractors will cause uncertainty, delay and disruption at the site. The cost savings, if any, of introducing new contractors to the site are difficult to estimate. Instead, there is certainty in cost and time by using existing contractors.

35. Finally, unsecured creditors will benefit the most in a CCAA proceeding. As mentioned above, there is significant equity in the Nuvo Property. By allowing the CCAA process to continue, the Applicant's can complete the Nuvo Building renovations. This will

increase the value of the Nuvo Property, which will in turn improve the probability of unsecured creditors seeing a recovery. The appointment of a receiver will likely ensure only Bridging's debt is covered without concern for lower ranking creditors or equity value.

36. For the foregoing reasons, these CCAA Proceedings are preferable to a receivership. Bridging's application seeking the appointment of a receiver should be dismissed.

**B. THE RESTRUCTURING- AND MONITOR-RELATED PROVISIONS IN THE AMENDED AND RESTATE INITIAL ORDER SHOULD BE GRANTED**

37. In an effort to comply with s. 11.001 of the CCAA, the relief provided to the Applicant in the Initial Order was limited to what was reasonably necessary for the initial ten-day stay period. The Applicant is now seeking to expand the relief granted by the Initial Order so that it more closely aligns with the Model Initial Order.

38. Specifically, the Applicant is seeking to include language that expands:

- (a) the Monitor's ability to advise the Applicant in the development of a plan of compromise or arrangement, hold and administer meeting(s) for voting purposes, as well as returning some of the additional protective language found in the Model Initial Order;
- (b) the Monitor's ability to, among other things, review and approve the Applicant's disbursements, monitor and oversee the renovations at the Nuvo Building and have full and complete access to the books and records of the Applicant and Nuvo Network Inc., in connection with the Monitor's consideration of the Applicant's cash flow requirements; and
- (c) the Monitor's ability to oversee the Nuvo Building's renovations and to report to, meet with and discuss with affected parties all matters relating to the Nuvo Building's renovations.

Saulnier Comeback Affidavit at para 19, Applicant's Motion Record, Tab 2.

Proposed Amended and Restated Initial Order at para 25-27, Applicant's Motion Record, Tab 3.

39. The proposed restructuring and Monitor-related provisions being requested are largely identical to provisions that are found in the Model Initial Order, albeit with some augmented Monitor's powers as per the Meridian DIP Agreement.

Saulnier Comeback Affidavit at paras 17-19, Applicant's Motion Record, Tab 2.

40. In recent CCAA proceedings, this Court has inserted restructuring- and Monitor-related provisions from the Model Initial Order into amended and restated initial orders granted as part of a CCAA comeback hearing. This has recently occurred in *Re Lydian International Limited (Re)* and *Re AgMedica Bioscience Inc et al.*

*Lydian International Limited (Re)*, 2019 ONSC 7473 at para 4, BOA Tab 8; see also *Lydian International Limited (Re)* (23 January 2020), Toronto CV-19-00633392-00CL (Ont Sup Ct [Comm List]) Amended and Restated Initial Order, BOA Tab 9.

*Re AgMedica Bioscience Inc et al.* (12 December 2019), Toronto CV-19-00632052-00CL (Ont Sup Ct [Comm List]) Amended and Restated Initial Order, BOA Tab 10.

41. The Applicant submits that the insertion of the restructuring- and Monitor-related provisions in the Amended and Restated Initial Order is necessary in the circumstances as it will enable the Applicant and the Monitor to take certain steps that may become necessary during the CCAA Proceedings with a view to maximizing stakeholder value, including exploring potential sale and refinancing options.

### **C. THE INCREASE IN THE ADMINISTRATION CHARGE SHOULD BE APPROVED**

42. The Applicant requests that this Court increase the Administration Charge to \$300,000. The Applicant has worked with Richter and the proposed DIP Lender to estimate the proposed quantum of the Administration Charge and believes it to be reasonable and

appropriate in view of the complexities of the Applicant's CCAA Proceedings and the services to be provided by the beneficiaries of the Administration Charge.

Saulnier Comeback Affidavit at para 20, Applicant's Motion Record, Tab 2.

Initial Saulnier Affidavit at para 118, Applicant's Motion Record, Tab 2 - Exhibit "A".

43. As was submitted in the Applicant's initial factum when originally requesting the Administration Charge, this Court has the statutory jurisdiction to grant the Administration Charge pursuant to s. 11.52 of the CCAA. This same statutory jurisdiction can be used by the Court to increase the amount of the Administration Charge, as has frequently occurred at recent comeback motions following an initial ten-day stay period.

CCAA, s. 11.52.

*Canwest Publishing Inc, Re*, 2010 ONSC 222 [*Canwest Publishing*] at paras 37-40, BOA at Tab 11.

Compare *Re AgMedica Bioscience Inc et al.* (2 December 2019), Toronto CV-19-00632052-00CL (Ont Sup Ct [Comm List]) Initial Order at para 27, BOA Tab 10 and *Re AgMedica Bioscience Inc et al.* (12 December 2019), Toronto CV-19-00632052-00CL (Ont Sup Ct [Comm List]) Amended and Restated Initial Order at para 34, BOA Tab 12.

44. The Applicant's initial factum with respect to the Initial Order outlined and applied six non-exhaustive factors developed by Pepall J. (as she then was) in *Canwest Publishing* to establish that the granting of the Administration Charge was warranted. Those factors were: (i) the size and complexity of the business being restructured; (ii) the proposed role of the beneficiaries of the charge; (iii) whether there is an unwarranted duplication of roles; (iv) whether the quantum of the proposed charge appears to be fair and reasonable; (v) the position of the secured creditors likely to be affected by the charge; and (vi) the position of the monitor.

*Canwest Publishing* at para 54, BOA at Tab 11.

45. For reasons similar to those that supported the granting of the Administration Charge as it was originally formulated, the Administration Charge should now be increased to \$300,000 to better protect the Monitor, counsel to the Monitor and counsel to the Applicant. The beneficiaries of the Administration Charge will play key roles in these CCAA Proceedings, with the Monitor having enhanced powers and responsibilities as per the proposed Amended and Restated Initial Order. There is no unwarranted duplication of roles amongst these parties. As at the time of the Initial Order, the Administration Charge will continue to rank in priority to all other court-ordered charges. Any existing secured creditors who will be affected by the increase in the amount of the Administration Charge have been provided notice of this increase.

Saulnier Comeback Affidavit at paras 117-120, Applicant's Motion Record, Tab 2.

Initial Saulnier Affidavit at para 59, Applicant's Motion Record, Tab 2 - Exhibit "A".

46. The Monitor and Meridian support the proposed increase to the Administration Charge.

First Report of the Monitor at paras 57-59.

#### **D. THE MERIDIAN DIP AGREEMENT, DIP FACILITY AND DIP CHARGE SHOULD BE APPROVED**

##### **i. Overview of the Meridian DIP Agreement**

47. As briefly mentioned above, Meridian has agreed to provide the Applicant with the DIP Facility. The DIP Facility is critical to the Applicant's on-going business operations. Briefly, the Meridian DIP Agreement includes the following terms:

- (a) the Applicant is the borrower under the DIP Facility and Nuvo Network Inc. is the guarantor;
- (b) the maximum amount of the DIP Facility is \$7.18 million;



- (c) interest is charged at a rate of 9.25% per annum; and
- (d) the DIP Facility is to be secured by the DIP Charge, which is to be a second-ranking charge (behind the Administration Charge, but ahead of any other charges and any existing security granted by the Applicant in favour of their secured creditors).

Saulnier Comeback Affidavit at para 22, Applicant's Motion Record, Tab 2.

First Report of the Monitor at para 39.

48. The DIP Facility is expected to provide sufficient liquidity to allow the Applicant to complete construction and meet post-filing obligations.

Saulnier Comeback Affidavit at para 23, Applicant's Motion Record, Tab 2.

**ii. Jurisdiction to Approve the Meridian DIP Agreement, DIP Facility and DIP Charge**

49. This Court's authority to authorize funding in the context of a CCAA restructuring is found in s. 11.2(1) and 11.2(2) of the CCAA, which expressly permit the granting of a charge over the property of a debtor that ranks in priority to the claims of any secured creditor.

CCAA, s. 11.2(1) and 11.2(2).

50. In considering whether to approve DIP financing, the Court is to consider the non-exhaustive list of factors set out in s. 11.2(4) of the CCAA:

**Factors to be considered**

**11.2 (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.

CCAA, s. 11.2(4).

51. This Court frequently exercises its authority to approve DIP financing that is secured by a priority charge on the debtor company's assets. Recent cases where this Court has approved DIP financing as part of the relief granted at the debtor company's comeback motion include *Clover Leaf Holdings Company, Re*, *Re AgMedica Bioscience Inc et al.* and *Re Wayland Group Corp et al.*

*Clover Leaf Holdings Company, Re*, 2019 ONSC 6966 at paras 20-23, BOA Tab 13.

*Re AgMedica Bioscience Inc et al.* (12 December 2019), Toronto CV-19-00632052-00CL (Ont Sup Ct [Comm List]) Amended and Restated Initial Order at para 34, BOA Tab 10.

*Re Wayland Group Corp et al.* (granted 4 December 2019, dated 2 December 2019), Toronto CV-19-00632079-00CL (Ont Sup Ct [Comm List]) Amended and Restated Initial Order at para 29, BOA Tab 14.

### **iii. The Applicant Satisfies the Criteria of s. 11.2 of the CCAA**

52. Based on the following factors, the Meridian DIP Agreement, DIP Facility, DIP Charge should be approved:

- (a) the DIP Facility is necessary for the Applicant to continue to operate as a going concern. The DIP Facility is expected to provide sufficient liquidity to allow the Applicant to complete construction;

- (b) the ability to draw on the DIP Facility will stabilize the business and allow the Applicant to focus on restructuring its business, which will improve the chances of recovery for the Applicant's stakeholders;
- (c) the quantum of the DIP Facility is reasonable and appropriate having regard to the Applicant's cash-flow forecasts;
- (d) the Monitor will supervise the spending of the funds drawn under the DIP Facility;
- (e) the Monitor is supportive of obtaining the DIP Facility and views the terms of the DIP Facility to be commercially reasonable;
- (f) the DIP Charge does not secure an obligation that existed before the granting of the Initial Order, in respect of existing lenders. The Applicant notes that the DIP Facility will be used in part to make critical supplier payments to providers of construction services; and
- (g) the Applicant has provided notice of the DIP Charge to affected secured creditors as required under s. 11.2(1) of the CCAA.

First Report of the Monitor at paras 40-41, 62.

Saulnier Comeback Affidavit at paras 22-23, Applicant's Motion Record, Tab 2.

53. Accordingly, the requested relief in respect to the DIP Agreement, DIP Facility, and the DIP Charge is reasonably necessary and appropriate in the circumstances.

**E. THE CONTRACTORS SHOULD BE DEEMED CRITICAL SUPPLIERS AND PAID THE PRE-FILING AMOUNTS OWING TO THEM**

54. The proposed Amended and Restated Initial Order designates the Contractors as "critical suppliers" and contemplates the payment of pre-filing amounts to them.

55. Section 11.4 of the CCAA authorizes the Court to make an order declaring a person to be a critical supplier if:

- (a) the Court is satisfied that the person is a supplier of goods or services to the debtor company; and
- (b) the goods or services that are supplied to the debtor company are critical to its continued operation.

CCAA, s. 11.4(1).

56. While there is no definition of "critical supplier" in the CCAA, Morawetz J. (as he then was) wrote in *Re Prizm Income Fund* that a critical supplier is a supplier who provides goods or services that, if interrupted, would result in an immediate material adverse impact on the debtor company:

Having reviewed the record, I have been satisfied that any interruption of supply by the Critical Suppliers could have an immediate material adverse impact on the Prizm Entities business, operations and cash flow such that it is, in my view, appropriate to declare the Critical Suppliers as "critical suppliers" pursuant to the CCAA.

*Prizm Income Fund, Re*, 2011 ONSC 2061 at para 34, BOA Tab 15.

57. Upon declaring a person to be a critical supplier, the Court may make an order requiring the person to supply any goods or services specified by the Court to the debtor company on any terms and conditions that are consistent with the supply relationship or that the Court considers appropriate.

CCAA, s. 11.4(2).

58. The Applicant further requests that this Court authorize the payment of pre-filing amounts to the Contractors. Such relief is commonly granted in lieu of a super-priority

charge in favour of critical suppliers. In granting this relief, the Court commonly considers a number of factors, including:

- (a) whether the goods and services are integral to the business of the applicants;
- (b) the applicant's dependency on the uninterrupted supply of the goods or services;
- (c) whether a supplier can be easily replaced;
- (d) the fact that no payments would be made with the consent of the monitor;
- (e) the monitor's support and willingness to work with the applicant to ensure that payments to suppliers in respect of pre-filing liabilities are minimized;
- (f) whether the applicant has sufficient inventory of the goods on hand to meet its needs;
- (g) the effect on the debtor company's ongoing operations and ability to restructure if it were unable to make pre-filing payments to its critical suppliers; and
- (h) whether the critical supplier would benefit from a super-priority charge.

*Index Energy Mills Road Corporation (Re)*, 2017 ONSC 4944 at para 30-31, BOA Tab 16.

See also *Re Performance Sports Group Ltd*, 2016 ONSC 6800 at para 22-25, BOA Tab 17; *Canwest Publishing* at paras 42-43, BOA Tab 11.

59. The Applicant respectfully submits that the Contractors satisfy the requirements to be declared "critical suppliers" under s. 11.4 of the CCAA and that it is appropriate to permit the payment of pre-filing amounts for the following reasons:

- (a) Maple Reinders is the general contractor responsible for the Nuvo Building's renovations. Barrie Glass is a key subcontractor of Maple Reinders. Both are

vital to achieving the goal of completing the Nuvo Building's renovations on schedule within budget. As such, their services are integral to the Applicant's business and its ability to successfully restructure;

- (b) the Applicant depends on the Contractors providing uninterrupted construction services. A delay in restarting the construction or any interruption thereafter would undermine the Applicant's ability to restructure;
- (c) the Applicant does not have readily available means to replace the Contractors, and doing so would be costly and time consuming;
- (d) the Monitor supports the payment of pre-filing amounts to the Contractors and understands that Meridian is fully supportive of paying pre-filing amounts to the Contractors;
- (e) the Applicant is working with the Monitor to ensure that only integral suppliers receive payments for pre-filing liabilities and that these payments are, where possible, minimized;
- (f) the Contractors require the pre-filing payments as a condition of their continued provision of services;
- (g) Both Maples Reinders and Barrie Glass have registered liens against the Nuvo Property; and
- (h) the Contractors will not have the benefit of a super-priority charge. They will, however, receive payments going forward as contemplated by the Monitor's cash flow forecast. Such payments are to be funded by the DIP Facility.

First Report of the Monitor at paras 51-54.

60. For the aforementioned reasons, this Court should declare that the Contractors are “critical suppliers” pursuant to s. 11.4 of the CCAA and that they must continue to provide their services to the Applicant on terms and conditions consistent with their previous supply relationship. Further, it is appropriate for this Court to permit the Applicant to make payments to certain of the Contractors in respect of pre-filing liabilities.

**F. IT IS APPROPRIATE TO EXTEND THE STAY PERIOD UNTIL OCTOBER 24, 2020**

61. The Stay Period expires on March 6, 2020. Pursuant to s. 11.02 of the CCAA, the Court may grant an extension of a stay of proceedings where: (i) circumstances exist that make the order appropriate; and (ii) the debtor company satisfies the Court that it has acted, and is acting, in good faith and with due diligence.

CCAA, s. 11.02(2) and (3).

62. There is no standard length of time provided in the CCAA for an extension of the stay period. It is to be long enough to permit reasonable progress to be made in preparation and negotiation of a plan, but short enough to keep pressure on the debtor company and to prevent complacency. It is not unheard of for a debtor company to be granted a stay extension of several months or longer when the debtor company is trying to maximize or evaluate the realizable value of its assets.

*Tepper Holdings Inc, Re*, 2011 NBQB 211 at paras 53-54, BOA Tab 18.

*Eddie Bauer of Canada Inc et al.* (22 June 2017), Toronto 09-8240-CL (Ont Sup Ct [Comm List]) Stay Extension Order (this was one of many lengthy stay extension orders in this case; this stay order in particular was for six months from June 30, 2017 to December 31, 2017), BOA Tab 19.

63. The Applicant is seeking to extend the Stay Period until October 24, 2020. This date was chosen primarily for two reasons:

- (a) the Nuvo Building's renovations are expected to be completed by September 30, 2020. Given that the thrust of these CCAA Proceedings is to maximize the value of the Applicant's property by renovating the Nuvo Building, it makes sense to give the Applicant the breathing room necessary to complete renovations and, when the renovations are complete, return to this Court to present its next steps; and
- (b) the Meridian DIP Agreement matures on October 24, 2020.

Saulnier Comeback Affidavit at para 31, Applicant's Motion Record, Tab 2.

64. Should it be necessary to return to the Court in the interim, the Applicant and the Monitor will do so, including in respect to a refinancing and SISP order.

65. No creditors are expected to suffer material prejudice as a result of the extension of the Stay Period. The Applicant is acting in good faith and with due diligence in pursuing its restructuring strategy.

First Report of the Monitor at para 45.

66. The Monitor supports extending the Stay Period until October 24, 2020.

First Report of the Monitor at para 45.

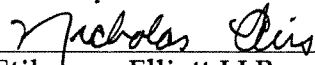
67. For the reasons described above, the Stay Period should be extended to October 24, 2020.



**PART V - ORDER SOUGHT**

68. For the foregoing reasons, the Applicant respectfully requests that this Court grant an Order substantially in the form of the draft Initial Order attached at Tab 3 to the Applicant's motion record.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 5th day of March, 2020.

  
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Stikeman Elliott LLP  
Lawyers for the Applicant

**SCHEDULE "A"**  
**LIST OF AUTHORITIES**

1. *Ted Leroy Trucking [Century Services] Ltd, Re*, 2010 SCC 60
2. *Forest & Marine Financial Corp, Re*, 2009 BCCA 319
3. *Pacific Shores Resort & Spa Ltd, Re*, 2011 BCSC 1775
4. *Re Forme Development Group Inc et al* (30 November 2018), Toronto CV-18-608313-00CL (ONSC) (initial CCAA order)
5. *Re Medican Holdings Ltd et al* (26 May 2010), Calgary 1001-07852 (ABQB) (initial CCAA order)
6. *Re Medican Holdings Ltd et al* (25 May 2010), Calgary 1001-07852 (ABQB) (affidavit of Wesley Reinheller)
7. *Computershare Trust Company of Canada v Meadows Development Ltd*, 2019 BCSC 1945
8. *Lydian International Limited (Re)*, 2019 ONSC 7473
9. *Lydian International Limited (Re)* (23 January 2020), Toronto CV-19-00633392-00CL (Ont Sup Ct [Comm List]) Amended and Restated Initial Order
10. *Re AgMedica Bioscience Inc et al.* (12 December 2019), Toronto CV-19-00632052-00CL (Ont Sup Ct [Comm List]) Amended and Restated Initial Order
11. *Canwest Publishing Inc, Re*, 2010 ONSC 222
12. *Re AgMedica Bioscience Inc et al.* (2 December 2019), Toronto CV-19-00632052-00CL (Ont Sup Ct [Comm List]) Initial Order
13. *Clover Leaf Holdings Company, Re*, 2019 ONSC 6966
14. *Re Wayland Group Corp et al.* (granted 4 December 2019, dated 2 December 2019), Toronto CV-19-00632079-00CL (Ont Sup Ct [Comm List]) Amended and Restated Initial Order
15. *Priszm Income Fund, Re*, 2011 ONSC 2061
16. *Index Energy Mills Road Corporation (Re)*, 2017 ONSC 4944
17. *Re Performance Sports Group Ltd*, 2016 ONSC 6800
18. *Tepper Holdings Inc, Re*, 2011 NBQB 211
19. *Eddie Bauer of Canada Inc et al.* (22 June 2017), Toronto 09-8240-CL (Ont Sup Ct [Comm List]) Stay Extension Order

**SCHEDULE "B"**  
**RELEVANT STATUTES**

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

**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**

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

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

[...]

### **Interim financing**

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

### **Priority — secured creditors**

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

### **Priority — other orders**

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

### **Factors to be considered**

**11.2 (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.

[...]

### **Critical supplier**

**11.4 (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 a person to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods or services to the company and that the goods or services that are supplied are critical to the company's continued operation.

### **Obligation to supply**

**11.4 (2)** If the court declares a person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.

### **Security or charge in favour of critical supplier**

**11.4 (3)** If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied under the terms of the order.

### **Priority**

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

### **Court may order security or charge to cover certain costs**

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

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

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

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

**Priority**

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

[...]

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 2607380 ONTARIO INC.

Court File No.: CV-20-00636875-00CL

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**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
**(COMMERCIAL LIST)**  
Proceeding commenced at Toronto

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**FACTUM OF THE APPLICANT**  
**(RETURNABLE MARCH 6, 2020)**

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