

**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 ROBERTS COMPANY CANADA LIMITED**

Applicant

**FACTUM OF THE APPLICANT
(CCAA Initial Application returnable June 29, 2020)**

June 26, 2020

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FACTUM OF THE APPLICANT

PART I - OVERVIEW¹

1. Roberts Company Canada Limited (the “**Applicant**” or “**RCCL**”) seeks creditor protection and other ancillary relief pursuant to an order (the “**Initial Order**”) under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36, as amended (the “**CCAA**”), substantially in the form of the draft order attached at Tab 3 to the Applicant’s Application Record.
2. RCCL is a privately held company that is in the business of manufacturing, marketing and distributing a comprehensive range of flooring, installation tools, adhesives and other flooring-related products in Canada.
3. RCCL historically operated as a profitable business, manufacturing and selling its products, as well as those of its affiliates, to large Canadian retailers and distributors. In an attempt to expand and diversify its business, RCCL acquired substantially all of the Canada-based assets related to the trading

¹ All capitalized terms used but not otherwise defined below have the meanings ascribed to them in the Affidavit of Ravi Williams-Singh, sworn June 26, 2020 in support of the Initial Order (the “**Initial Affidavit**”).

product sales division of the Kraus Group (as defined below) which involved the distribution and sale of flooring products to commercial and residential customers (the “**TPS Business**”).

4. The synergies and benefits that RCCL believed would accrue from its acquisition of the TPS Business have not materialized. Rather than complement RCCL’s business, the TPS Business has incurred substantial losses since its acquisition in October 2018 that now threaten the viability of RCCL. The COVID-19 pandemic has further complicated RCCL’s management’s efforts to mitigate such losses.

5. RCCL is party to the ABL Agreement (as defined below). RCCL’s obligations under the ABL Agreement are secured against all of RCCL’s assets. On April 17, 2020, Bank of America, N.A. (“**BOA**”), as agent (the “**Agent**”) under the ABL Agreement, provided written notice of an Event of Default under the ABL Agreement resulting from the Borrowers’ (as defined below) violation of certain covenants under the ABL Agreement.

6. RCCL requires significant and continued funding from BOA and its parent company Q.E.P. Co., Inc., (“**QEP**”). Without such funding, RCCL, as currently structured, is unable to financially support all of its operations and is unable to meet its obligations as they come due. Given RCCL’s ongoing liquidity issues, further funding is not available to RCCL from QEP absent a significant restructuring.

7. RCCL is insolvent and urgently requires protection under the CCAA to maintain the status quo as it considers restructuring options for the benefit of its stakeholders. Without CCAA protection, RCCL is anticipated to run out of cash in the near future, at which point it will be forced to cease operations.

8. RCCL and the other Borrowers under the ABL Agreement have entered into ABL Forbearance Agreement (defined below) pursuant to which the Agent and the Lenders (defined below) have agreed to forbear from exercising their rights and remedies under the ABL Agreement with respect to existing

defaults, continue to make available the credit facilities under the ABL Agreement to meet RCCL's working capital requirements, and extend credit and make advances in order to support the ongoing working capital needs of RCCL at the outset of the restructuring, pending potential debtor-in-possession funding arrangements to be entered into after the commencement of the CCAA proceeding.

9. On this initial application, RCCL seeks relief that is reasonably necessary for its continued operation in the ordinary course of business during the initial 10-day stay period.

PART II - THE FACTS

10. The facts with respect to this Application are more fully set out in the Affidavit of Ravi Williams-Singh sworn June 26, 2020 (the "**Initial Affidavit**"). All references to currency in this factum are references to Canadian dollars, unless otherwise indicated.

11. RCCL is a privately held corporation incorporated under the *Business Corporations Act*, R.S.O. 1990, c. B. 16 (the "**OBCA**") (Ontario) and headquartered in Brampton, Ontario. To facilitate the operation of its business, RCCL is extra-provincially registered under the laws of British Columbia, New Brunswick, Manitoba, Alberta, Saskatchewan, Nova Scotia, Quebec, and Newfoundland and Labrador.

Affidavit of Ravi Williams-Singh sworn June 26, 2020 at paras 15-16 [Initial Affidavit], Applicant's Application Record, Tab 2 [Application Record].

12. RCCL is the direct wholly-owned subsidiary of Roberts Consolidated Industries, Inc. ("**RCI**") and an indirect wholly-owned subsidiary of QEP. RCI is a direct wholly-owned subsidiary of QEP. RCCL does not have any subsidiaries.

Initial Affidavit at para 17, Application Record, Tab 2.

13. On September 11, 2018, Kraus Brands Inc., Kraus Canada Ltd., Kraus Carpet Inc., Kraus Properties Inc., Kraus USA Inc., and Strudex Inc. (the “**Kraus Applicants**”) filed for and obtained protection under the CCAA. Pursuant to the initial order granted by this Court in those CCAA proceedings, the stay of proceedings granted in respect of the Kraus Applicants was extended to certain partnerships affiliated with the Kraus Applicants (together with the Applicants, the “**Kraus Group**”). At the time of its CCAA application, the Kraus Group was a vertically-integrated manufacturer of premium carpet for the commercial and residential market, as well as a distributor in North America of flooring products produced by other manufacturers.

Initial Affidavit at para 22, Application Record, Tab 2.

14. Pursuant to an Asset Purchase Agreement dated September 10, 2018 between RCCL and QEP, as purchasers, and Kraus Canada LP, Kraus Properties LP and Kraus USA Inc., as vendors, RCCL and QEP acquired substantially all of the assets related to the TPS Business of the Kraus Group.

Initial Affidavit at para 23, Application Record, Tab 2.

15. The aspects and portions of the TPS Business purchased from the Kraus Group located in Canada are owned and operated by RCCL. Similarly, the aspects and portions of the TPS Business purchased from the Kraus Group located in the United States of America are owned and operated by QEP.

Initial Affidavit at para 24, Application Record, Tab 2

16. Following RCCL’s acquisition of the TPS Business from the Kraus Applicants, RCCL’s business operations can be broadly divided into two business segments. These two segments are:

- (a) ***Large Customer Segment*** – historically consisting of manufacturing and distributing a variety of flooring, installation tools, adhesives, and other flooring-related products, to

large home improvement chains (referred to as the “**Large Customer Segment**”) for use by do-it-yourself consumers as well as construction, remodeling and installation professionals; and

- (b) **TPS Business Segment** – consisting of selling flooring and related products to independent dealers and distributors (referred to as the “**TPS Business Segment**”).

Initial Affidavit at para 26, Application Record, Tab 2.

17. As of April 29, 2020, RCCL employed approximately 87 employees (85 on a full-time basis and 2 on a temporary basis). All of RCCL’s employees are non-unionized.

Initial Affidavit at para 28, Application Record, Tab 2.

18. As of April 30, 2020, RCCL had total assets of approximately \$30,150,000, more than half of which is made up of inventory. As at April 30, 2020, the liabilities of the Applicant had an unaudited book value of approximately \$40,489,000.

Initial Affidavit at paras 37-38, Application Record, Tab 2.

19. RCCL’s primary debt obligations consist of amounts owed under the Fourth Amended and Restated Loan Agreement, dated as of January 31, 2017, as subsequently amended by amending agreements dated as of October 5, 2018, January 22, 2019, July 26, 2019, and January 27, 2020 (as amended, supplemented and otherwise modified from time to time, the “**ABL Agreement**”), that was entered into by and among RCCL (as “**Canadian Borrower**”), QEP, RCI, Roberts Holding International, Inc., Q.E.P. Zocalis Holding L.L.C., Boiardi Products Corporation, Roberts Capitol, Inc., QEP – California, Inc., QGrow Products, Inc., QEP – Tennessee, Inc., Liberty Creek, Inc., Imperial Industries, Inc., All-Force Tool Company, Q.E.P. Sun Valley, Inc., Q.E.P. Oklahoma, Inc., Faus Group, Inc., Premix-

Marbletite Manufacturing Co., A C Products Co. (collectively, the “**U.S. Borrowers**” and together with the Canadian Borrower, the “**Borrowers**”), BOA and the lenders from time to time party to the ABL Agreement (the “**Lenders**”), and BOA in its capacity as Agent for the Lenders. RCCL’s obligations under the ABL Agreement are secured by first priority liens over all of RCCL’s assets.

Initial Affidavit at paras 42-51, Application Record, Tab 2.

20. RCCL’s financial and operational difficulties are primarily due to the inherently high costs of operating the TPS Business Segment in Canada in comparison to the Large Customer Segment, as well as macroeconomic conditions in Canada including those resulting from the COVID-19 pandemic.

Initial Affidavit at para 64, Application Record, Tab 2.

21. In contrast to the Large Customer Segment, the TPS Business Segment is significantly more capital intensive, with considerably more customers than the Large Customer Segment. Onerous overhead and other costs are required to service such customers, including a large sales force, a large supply of product samples and product displays, and other logistics and freight costs.

Initial Affidavit at para 27, Application Record, Tab 2.

22. RCCL has made various efforts to improve its financial and/or operational issues. The efficacy of these efforts have been hampered by the public health emergency caused by COVID-19 and the states of emergency and public health orders requiring social distancing, self-isolation and restricting gatherings that have been declared in Canada by the federal and provincial governments.

Initial Affidavit at paras 66, 78, Application Record, Tab 2.

23. As previously noted, RCCL requires significant and continued funding from QEP in order to sustain its operations. In light of RCCL's ongoing liquidity issues, further funding is not available to RCCL from QEP absent a significant restructuring.

Initial Affidavit at para 67, Application Record, Tab 2.

24. Also as previously noted, BOA has provided written notice to QEP of an Event of Default under the ABL Agreement resulting from the Borrowers' violation of certain covenants under the ABL Agreement. RCCL relies upon the restricted availability under the ABL Agreement in order to finance its operations. Absent such availability under the ABL Agreement and the accommodations provided by QEP to RCCL, RCCL is unable to carry on business in the ordinary course, is insolvent, and is unable to meet all of its obligations as they come due.

Initial Affidavit at paras 69-70, Application Record, Tab 2.

25. BOA was properly notified of RCCL's intention to apply for relief under the CCAA and to seek the appointment of Richter Advisory Group Inc. ("**Richter**") as monitor (in such capacity, the "**Monitor**") from this Court. Following extensive discussions between, among others, RCCL, Richter, the Agent, and each party's respective counsel, RCCL entered into the Forbearance Agreement and Amendment No. 5 to Fourth Amended and Restated Loan Agreement, dated as of June 26, 2020, by and among the Borrower, the Lenders and the Agent (the "**ABL Forbearance Agreement**"). Pursuant to the ABL Forbearance Agreement, the Agent and the Lenders have agreed to forbear from exercising their rights and remedies against the Borrowers with respect to existing defaults during the Forbearance Period (as defined in the ABL Forbearance Agreement).

Initial Affidavit at para 71, Application Record, Tab 2.

26. The Agent and the Lenders will, subject to the terms and conditions of the ABL Forbearance Agreement, continue to make available to the Borrowers, the credit facilities under the ABL Agreement to meet the Borrowers' working capital requirements and extend credit and make advances in order to support the ongoing working capital needs of the Borrowers.

Initial Affidavit at para 73, Application Record, Tab 2.

27. Absent the granting of the Initial Order, a shut down of RCCL's operations is inevitable, which would have an adverse impact on RCCL's stakeholders, including employees and customers. The CCAA proceeding would provide a forum to explore a plan of compromise or arrangement under the CCAA that would seek to maximize creditor and stakeholder recoveries and facilitate the potential sale or other strategic transaction in addition to, or as an alternative to, a plan of compromise or arrangement, with the purpose of maximizing value for all stakeholders.

Pre-Filing Report of the Proposed Monitor Richter Advisory Group Inc. dated June 26, 2020 at paras 43, 62 [Monitor's Report].

PART III - ISSUES

28. The issues before this Court, as addressed below, are whether:

- (a) RCCL meets the criteria for, and should be granted, protection under the CCAA;
- (b) the proposed monitor, Richter, should be appointed as Monitor in these proceedings; and
- (c) this Court should exercise its discretion to grant the Administration Charge and the Directors' Charge (each as defined below).

PART IV - THE LAW

A. THIS COURT SHOULD GRANT RCCL PROTECTION UNDER THE CCAA

1. RCCL is a “Debtor Company” to which the CCAA applies

29. The CCAA applies to a “debtor company” or affiliated debtor companies whose liabilities exceed \$5 million. A “debtor company” is defined, *inter alia*, as a “company” that is “insolvent” or that has committed an act of bankruptcy within the meaning of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3, as amended (the “BIA”).

[Companies’ Creditors Arrangement Act](#), RSC 1985, c. C-36, s 2(1) “debtor company” and 3(1) [[CCAA](#)].

(a) RCCL is a “Company”

30. The CCAA defines “company” as, among other things,

[...] any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province and any incorporated company having assets or doing business in Canada, wherever incorporated [...]

[CCAA](#), s 2(1) “company”.

31. RCCL is a corporation incorporated under the laws of the Province of Ontario. Thus, it meets the CCAA definition of “company” and is therefore eligible for CCAA protection.

Initial Affidavit at para 15, Application Record, Tab 2.

(b) RCCL is a “Debtor Company” under the CCAA

32. The CCAA defines a “debtor company” as, among other things, a company that is “insolvent”.

[CCAA](#), s 2(1) “debtor company”, “company”, s 3(1).

33. The CCAA does not provide a definition for the term “insolvent”. However, it is well-established that in a CCAA application this term can be interpreted by reference to “insolvent person” in section 2(1) of the BIA. The BIA defines an “insolvent person” as a person who:

- (a) is for any reason unable to meet his obligations as they generally become due (the “**Liquidity Test**”);
- (b) has ceased paying their current obligations in the ordinary course of business as they generally become due; or
- (c) has property that in an aggregate is not, at 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 (the “**Balance Sheet Test**”)

[*Bankruptcy and Insolvency Act*](#), RSC 1985, c B-3, s 2, “insolvent person” [[BIA](#)].

34. The tests for insolvency are disjunctive. A company satisfying any one of these tests at the time of its application for an initial order is considered insolvent for the purposes of the CCAA.

[*Stelco Inc. Re.*](#), 2004 48 CBR (4th) 299 (Ont. S.C.J. [Comm List]) at para 28 [[Stelco](#)].

[*Cinram International Inc. Re.*](#), 2012 ONSC 3767 at para 50.

35. In *Re Stelco Inc.*, Farley J. held that a company is also insolvent for the purposes of the CCAA “if it is reasonably expected to run out of liquidity within reasonable proximity of time as compared with the time reasonably required to implement a restructuring”.

[Stelco](#), at paras 26, 40.

36. RCCL is insolvent under the Balance Sheet Test because it appears that the realizable value of its assets is not sufficient to satisfy its existing liabilities and its contingent liabilities. Based on RCCL's Balance Sheet, as at April 30, 2020, RCCL had assets with a net book value of approximately \$30.1 million, and liabilities with a net book value of approximately \$40.5 million. Further, the realizable value of certain categories of RCCL's assets may be lower than the book values reported in RCCL's financial statements. Given the TPS Business Segment's performance, it is reasonable to expect that the realizable value of the assets of RCCL at a fairly conducted sale would be less than the above-noted book value.

Initial Affidavit at paras 81-85, Application Record, Tab 2

37. RCCL is also insolvent under the Liquidity Test. RCCL relies upon the restricted availability under the ABL Agreement, which ABL Facility is currently in default. Absent such availability, RCCL is unable to carry on business in the ordinary course, is insolvent and is unable to meet all of its obligations as they come due. Furthermore, RCCL is not generating sufficient cash flow to sustain its operations independently of QEP (its parent company). With the cessation of support from QEP, RCCL is unable to meet its obligations as they generally become due.

Initial Affidavit at paras 81-85, Application Record, Tab 2.

(c) RCCL has over \$5 million in liabilities

38. RCCL's aggregate outstanding liabilities are well in excess of \$5 million. As of April 30, 2020, RCL had liabilities of approximately \$40,489,000. As such, RCCL's debt exceeds the monetary threshold (\$5 million) for protection under the CCAA.

Initial Affidavit at para 38, Application Record, Tab 2.

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

39. For all of the reasons provided above, RCCL is a debtor company to which the CCAA applies and is eligible for protection under the CCAA.

2. This Court has the jurisdiction over RCCL's CCAA Proceeding

40. Subsection 9(1) of the CCAA provides that an application for a CCAA stay may be made to the court in the jurisdiction (i) where the company has its head office or chief place of business in Canada (meaning its registered office); or (ii) where the applicant's assets are situated if there is no place of business in Canada.

[CCAA](#), s 9(1).

41. RCCL's registered office address is in Brampton, Ontario. RCCL also has assets and inventory situated at other locations in Ontario. As such, Ontario is the appropriate jurisdiction to hear this Application.

3. An Order Granting a Stay of Proceedings is Appropriate

42. Pursuant to section 11.02(1) of the CCAA, this Court may make an order staying all proceedings in respect of a debtor company on an initial application for a period of not more than 10 days, provided that this Court is satisfied that circumstances make the order appropriate.

[CCAA](#), s 11.02(1).

43. As a result of recent amendments to the CCAA, the relief granted during the initial 10-day stay period must 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".

[CCAA](#), s 11.001.

44. The purposes of the stay of proceedings under the CCAA are, among other things, to maintain the status quo among creditors while a debtor company seeks to reorganize or restructure its financial affairs. It aims to prevent creditors and other parties from acting on the insolvency of the debtor company or other contractual breaches caused by the insolvency to terminate contracts. It also seeks to prevent creditors from accelerating the repayment of the indebtedness owing by the debtor company when it would interfere with the ability of the debtor company to reorganize or restructure its financial affairs.

Re, Doman Industries Ltd (Trustee of), 2003 BCSC 376 at para 22.

45. It is just and appropriate for this Court to grant a stay of proceedings in respect of RCCL. RCCL requires a stay of proceedings to maintain the status quo among creditors while it explores its restructuring options and seeks to reorganize or restructure its financial affairs. In the absence of a stay of proceedings, RCCL may face multiple uncoordinated enforcement proceedings by certain contractual counterparties which will result in a loss of value. It would be detrimental to RCCL's business and stakeholders if such proceedings are commenced or continued, or such rights and remedies are executed against RCCL. Accordingly, in the circumstances, the stay of proceeding is in the best interests of RCCL and its stakeholders.

Initial Affidavit at paras 88-90, Application Record, Tab 2.

B. RICHTER SHOULD BE APPOINTED AS MONITOR

46. Upon the granting of an initial order, section 11.7 of the CCAA requires that a trustee be appointed to monitor the business and financial affairs of the company. Richter is a trustee under section 2(1) of the BIA and is not subject to any of the restrictions under section 11.7(2) of the CCAA that preclude it from being appointed as monitor. Richter has consented to acting as the Monitor in these CCAA proceedings, and should be appointed.

[CCAA](#), s 11.7, s 11.7(2).

[BIA](#), s 2(1), “trustee or licenses trustee”.

Monitor’s Report at paras 9-10.

Initial Affidavit at para 91, Application Record, Tab 2.

C. THE PRIORITY CHARGES SHOULD BE GRANTED

(a) The Administration Charge

47. RCCL is seeking a court-ordered charge on its assets, property and undertakings (the “**Property**”) in the amount of \$500,000 to secure the professional fees and disbursements of the proposed Monitor, along with its counsel and the Applicant’s counsel, incurred at their standard rates and charges, both before and after the making of the Initial Order in respect of the proceedings (the “**Administration Charge**”).

Initial Affidavit at para 94, Application Record, Tab 2.

48. RCCL has worked with Richter, the proposed Monitor, to estimate the quantum of the Administration Charge and believes it to be fair and reasonable in the circumstances. Richter, as proposed Monitor, has reviewed the quantum of the Administration Charge and believes that it is reasonable in view of the complexities of RCCL’s CCAA proceedings and the services to be provided by the beneficiaries of the Administration Charge.

Initial Affidavit at paras 95-96, Application Record, Tab 2

Monitor’s Report at paras 52-54.

49. Section 11.52 of the CCAA provides this Court with the jurisdiction to grant an administration charge.

[CCAA](#), s 11.52.

50. In addition to the considerations set out in section 11.52 of the CCAA, courts have considered the following list of non-exhaustive factors when granting an administration charge:

- (a) the size and complexity of the business being restructured;
- (b) the proposed role of the beneficiaries of the charge;
- (c) whether there is unwarranted duplication of roles;
- (d) whether the quantum of the proposed charge appears to be fair and reasonable;
- (e) the position of the secured creditors likely to be affected by the charge; and
- (f) the position of the Monitor.

[Canwest Publishing Inc. Re](#), 2010 ONSC 222 at para 54 [[Canwest](#)].

51. RCCL submits that it is appropriate for this Court to exercise its jurisdiction and grant the Administration Charge, given that:

- (a) RCCL requires the expertise, knowledge, and continuing participation of the proposed beneficiaries of the Administration Charge to complete a successful restructuring;
- (b) the beneficiaries of the Administration Charge have, and will continue to, contribute to these CCAA proceedings and assist RCCL with its business, including continuing operations in the ordinary course;
- (c) each proposed beneficiary of the Administration Charge is performing distinct functions and there is no duplication of roles;

- (d) the quantum of the proposed charge is fair and reasonable; and
- (e) the proposed Monitor is supportive of the Administration Charge.

Initial Affidavit at paras 94-96, Application Record, Tab 2.

Monitor's Report at paras 52-54.

(b) The Directors' Charge

52. RCCL is seeking a court-ordered charge over the Property in the amount of \$250,000 to secure the indemnity of its directors and officers for liabilities they may incur during these CCAA proceedings, which may include unpaid accrued wages and unpaid accrued vacation pay, together with unremitted excise, sales, goods and services, and harmonized sales taxes (the "**Directors' Charge**").

Initial Affidavit at paras 100, Application Record, Tab 2.

53. RCCL maintains an insurance policy in respect of the potential liability of its directors and officers (the "**D&O Insurance Policy**"). Although the D&O Insurance Policy insures the directors and officers of RCCL for certain claims that may arise against them in their capacity as directors and/or officers of RCCL, coverage is subject to several exclusions and limitations and there is a potential for insufficient coverage in respect of potential director and officer liabilities. The directors and officers of RCCL have expressed their desire for certainty with respect to potential personal liability if they continue in their current capacities in these CCAA proceedings.

Initial Affidavit at para 99, Application Record, Tab 2.

54. Section 11.51 of the CCAA provides this Court with the express statutory jurisdiction to grant the Directors' Charge in an amount the Court considers appropriate, provided notice is given to the secured creditors who are likely to be affected by it.

[CCAA](#), s 11.51.

55. In *Canwest Publishing Inc.*, Re, Pepall J. articulated that “the purpose of such a charge is to keep the directors and officers in place during the restructuring by providing them with protections against liabilities they could incur during the restructuring”.

[Canwest](#), at para 48.

56. In *Lydian International Limited (Re)* (“**Lydian**”) and *Jaguar Mining Inc.*, Re, the court stated that, pursuant to the discretion conferred by section 11.51 of the CCAA, to grant a directors and officers' charge, the following must be considered:

- (a) whether notice has been given to secured creditors likely to be affected by the charge;
- (b) whether the amount is appropriate;
- (c) whether the applicant could obtain adequate indemnification insurance for the director at a reasonable cost; and
- (d) whether the charge applies in respect of any obligation incurred by a director as a result of the director's gross negligence or wilful misconduct.

[Lydian International Limited \(Re\)](#), 2019 ONSC 7473 at para 53 [[Lydian](#)].

[Jaguar Mining Inc. Re](#), 2014 ONSC 494 at para 42.

57. It is appropriate in these circumstances for this Court to exercise its jurisdiction and grant the Directors' Charge, given that:

- (a) notice of this application has been, or will be, given to the secured creditors likely to be affected by the Directors' Charge;
- (b) RCCL requires the active and committed involvement of the directors and officers during these CCAA proceedings;
- (c) the amount of the Directors' Charge is reasonable in the circumstances;
- (d) the proposed Monitor is of the view that the Directors' Charge is required and reasonable in the circumstances;
- (e) the Directors' Charge would only cover obligations and liabilities that the directors and officers may incur after the commencement of these CCAA proceedings and does not cover wilful misconduct or gross negligence.

Initial Affidavit at paras 97-101, Application Record, Tab 2

Monitor's Report at paras 55-58.

D. THE RELIEF SOUGHT IS REASONABLY NECESSARY

58. Pursuant to section 11.001 of the CCAA, the relief sought on an initial application is limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during the initial 10-day stay period.

[CCAA](#), s 11.001, s 11.02(1)-(3).

59. The Court in *Lydian* held that the purpose of section 11.001 is to “limit the decisions that can be taken at the outset of a CCAA proceeding to measure necessary to avoid the immediate liquidation of an insolvent company, thereby improving participation of all players.”

Lydian, at paras 22-26.

60. The relief sought by RCCL is reasonably necessary to ensure the continued operations of its business during the initial stay period. Therefore, RCCL submits that the relief sought in this initial application is in accordance with section 11.001 of the CCAA and is appropriate in the circumstances. After the initial stay period elapses, RCCL intends to return to the Court to request further relief.

Initial Affidavit at paras 87, 106, Application Record, Tab 2.

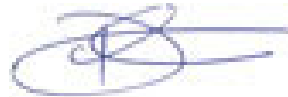
Monitor’s Report at paras 43, 62-63.

PART V - ORDER REQUESTED

61. For the foregoing reasons, RCCL respectfully requests that this Honourable Court grant an Order substantially in the form of the draft Initial Order attached at Tab 3 of the Applicant’s Application Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 26th day of June, 2020.

June 26, 2020



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SCHEDULE A – LIST OF AUTHORITIES

Cases Cited

1. [Canwest Publishing Inc. Re](#), 2010 ONSC 22
2. [Cinram International Inc. Re](#), 2012 ONSC 3767
3. [Jaguar Mining Inc. Re](#), 2014 ONSC 494
4. [Lydian International Limited, Re](#), 2019 ONSC 7473
5. [Doman Industries Ltd. Re](#), 2003 BCSC 376
6. [Stelco Inc. Re](#), 2004 48 CBR (4th) 299 (Ont. S.C.J. [Comm List])

SCHEDULE B – RELEVANT STATUTES

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

Section 2

“Company”

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.

“Debtor Company”

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;

Section 3

Application

(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.

Affiliated companies

(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.

Company controlled

(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.

Subsidiary

(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.

Section 9

Jurisdiction of court to receive applications

(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.

Single judge may exercise powers, subject to appeal

(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.

Section 11.001

Relief reasonably necessary

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.

Section 11.02

Stays, etc. – initial application

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

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act;

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

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

Stays, etc. — other than initial application

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

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

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

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

Burden of proof on application

(3) The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

Restriction

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

Section 11.51

Security or charge relating to director's indemnification

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

Priority

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

Restriction — indemnification insurance

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

Negligence, misconduct or fault

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

Section 11.52

Court may order security or charge to cover certain costs

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

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

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

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

Priority

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

Section 11.7

Court to appoint monitor

(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.

Restrictions on who may be monitor

(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).

Court may replace monitor

(3) On application by a creditor of the company, the court may, if it considers it appropriate in the circumstances, replace the monitor by appointing another trustee, within the meaning of subsection 2(1) of the Bankruptcy and Insolvency Act, to monitor the business and financial affairs of the company.

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

Section 2

“Insolvent Person”

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”

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

**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 OR COMPROMISE OR ARRANGEMENT OF ROBERTS COMPANY CANADA
LIMITED**

Court File No. CV-20-00643158-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings commenced in Toronto

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