

**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
(Amended and Restated Initial Order)
(Returnable July 8, 2020)**

July 6, 2020

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FACTUM OF THE APPLICANT

PART I - INTRODUCTION

1. Roberts Company Canada Limited (the “**Applicant**” or “**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.
2. On June 29, 2020 (the “**Initial Filing Date**”), the Applicant obtained an initial order (the “**Initial Order**”) under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36, as amended (the “**CCAA**”) which, among other things, granted a stay of proceedings in favour of the Applicant and their directors and officers until July 9, 2020 (the “**Stay Period**”), appointed Richter Advisory Group Inc. (“**Richter**”) as the monitor (in such capacity, the “**Monitor**”), and granted an Administration Charge and a Directors' Charge (each as defined in the Initial Order) over the Applicant's property.
3. This factum is filed in support of a motion by the Applicant for an amended and restated initial order (the “**Amended and Restated Initial Order**”), substantially in the form of the draft order attached as Tab 3 of the Applicant's Motion Record, *inter alia*,

- (a) expanding the Applicant's restructuring authority and the Monitor's ability to assist with the Applicant's restructuring efforts;
- (b) approving the KERP, the KERP Charge, and the sealing of the KERP Summary (each as defined below);
- (c) authorizing the Applicant, with the consent of the Monitor and in consultation with the Agent and the Lenders (each as defined below, and collectively, the "**ABL Lender**"), to pay amounts owing for goods and services actually supplied to RCCL prior to the date of the Initial Order by third party suppliers, up to the aggregate amount of \$700,000, if, in the opinion of RCCL, the supplier is critical to its business, its ongoing operations, or the preservation of RCCL's property, and the payment is required to ensure ongoing supply;
- (d) granting a charge (the "**ABL Lender's DIP Charge**") in favour of the ABL Lender over the assets, property and undertakings of the Applicant (the "**Property**") as security for all of the obligations of the Applicant to the ABL Lender relating to advances made to the Applicant under the ABL Agreement (as defined below) from and after the date of the proposed Amended and Restated Initial Order; and
- (e) extending the Stay Period in respect of the Applicant up to and including August 31, 2020.

PART II - THE FACTS

4. The facts with respect to this motion are more fully set out in the Affidavit of Ravi Williams-Singh sworn June 26, 2020 (the "**Initial Affidavit**"), and the Affidavit of Ravi Williams-Singh sworn July 6, 2020 (the "**Comeback Affidavit**").¹

¹ Affidavit of Ravi Williams-Singh, sworn June 26, 2020 [Initial Affidavit], Applicant's Motion Record at Tab 2, Exhibit "A" [Motion Record]; Affidavit of Ravi Williams-Singh, sworn July 6, 2020 [Comeback Affidavit], Motion Record at Tab 2.

5. Capitalized terms used herein but not otherwise defined have the meanings ascribed to them in the Comeback Affidavit. All references to currency in this factum are references to Canadian dollars, unless otherwise indicated.

A. BACKGROUND

6. The Applicant's request for relief under the CCAA was triggered by a confluence of factors, including the following:

- (a) RCCL historically operated as a profitable business. In an attempt to expand and diversify its business, RCCL acquired, in September 2018, substantially all of the Canada-based assets related to the trading products sales division of Kraus Brands Inc., Kraus Canada Ltd., Kraus Carpet Inc., Kraus Properties Inc., Kraus USA Inc., and Strudex Inc. which involved the distribution and sale of flooring products to commercial and residential customers (the "**TPS Business**"). The synergies and benefits that RCCL believed would accrue from its acquisition of the TPS Business did not materialize, the substantial losses incurred by the TPS Business threatened the viability of RCCL, and the COVID-19 pandemic further complicated RCCL's management's efforts to mitigate such losses.
- (b) RCCL requires significant and continued funding from Bank of America, N.A. ("**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 liquidity issues, further funding is not available to RCCL from QEP absent a significant restructuring.
- (c) RCCL's primary secured 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 and certain other U.S. borrowers (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 (together with BOA, the “**Lenders**”), and BOA in its capacity as the agent for the Lenders (in such capacity, the “**Agent**”). BOA has provided written notice to QEP of an Event of Default under the ABL Agreement. Absent 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.

6. Prior to the initiation of these CCAA proceedings (the “**CCAA Proceedings**”), 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 Borrowers, 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).

B. THE KERP AND THE KERP CHARGE

7. The proposed Amended and Restated Initial Order seeks approval of a key employee retention plan (the “**KERP**”).²

8. The KERP was developed by RCCL, in consultation with the Monitor, to facilitate and encourage the continued participation of four (4) key supply chain professionals and between two to five (2 to 5) other key

² Comeback Affidavit, *ibid* at para 14, Motion Record at Tab 2.

employees of RCCL who are integral to the stability of RCCL's business, the preservation of its value, and the execution and successful completion of RCCL's restructuring.

9. The KERP provides that RCCL shall pay each KERP beneficiary a lump sum cash payment (the "**Retention Payment**"), less applicable deductions within thirty (30) business days of December 31, 2020.

10. A summary of the KERP containing, among other things, the form of the letter setting out the terms of the KERP, the names of the KERP beneficiaries, and the Retention Payment to be made to each of the KERP beneficiaries (the "**KERP Summary**") is attached to the Comeback Affidavit as a confidential exhibit.³

11. RCCL is also seeking the granting of a Court-ordered charge over the Property of the Applicant up to the maximum aggregate amount of \$200,000 as security for payments under the KERP (the "**KERP Charge**"). It is proposed that the KERP Charge shall be a third-ranking charge, behind the Administration Charge and the Directors' Charge.⁴

C. PAYMENTS TO CRITICAL SUPPLIERS

12. As a manufacturer and distributor of a comprehensive range of flooring, installation tools, adhesives and other flooring-related products, RCCL's business relies on the continued provision of products and services from its suppliers. Accordingly, any interruption in the supply of products or services to RCCL could have an immediate and material adverse impact on RCCL's business operations.⁵

13. To ensure uninterrupted business operations during the CCAA Proceedings, the proposed Amended and Restated Initial Order authorizes (but does not require) RCCL to, with the consent of the Monitor and in consultation with the ABL Lender, make certain payments for goods and services actually supplied to RCCL

³ *Ibid* at Confidential Exhibit "A", Motion Record at Tab 2.

⁴ *Ibid* at para 21, Motion Record at Tab 2.

⁵ *Ibid* at paras 25-26, Motion Record at Tab 2.

prior to the Initial Filing Date, up to a maximum aggregate amount of \$700,000. Pursuant to the proposed Amended and Restated Initial Order, such payments may only be made to third parties that provide goods and services that are integral to RCCL's business, ongoing operations, or the preservation of RCCL's property, and where the payment is required to ensure ongoing supply.⁶

D. ABL LENDER'S DIP CHARGE

14. Pursuant to the ABL Forbearance Agreement, the ABL Lender: (i) agreed to forbear from exercising their rights and remedies against the Borrowers with respect to existing defaults during the Forbearance Period; and (ii) agreed to continue to make available to the Borrowers the credit facilities under the ABL Agreement and extend credit and make advances in order to support the ongoing working capital needs of the Borrowers.⁷

15. It is a condition of the ABL Forbearance Agreement that, by no later than July 9, 2020, RCCL shall obtain an order from this Court which provides that the aggregate of any and all advances of funds by the ABL Lender to RCCL under the ABL Agreement made on or after the date of such order shall be secured by a charge in favour of the Agent which ranks in priority to all other claims, liens or security interests against RCCL's Property other than (i) the Administration Charge, (ii) the Directors' Charge, and (iii) the KERP Charge.⁸

PART III - ISSUES

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

- (a) the Applicant's restructuring capabilities and the Monitor's powers should be expanded;

⁶ *Ibid* at paras 26, 28, Motion Record at Tab 2.

⁷ *Ibid* at para 31, Motion Record at Tab 2.

⁸ *Ibid* at para 33, Motion Record at Tab 2.

- (b) the KERP, the KERP Charge, and a sealing order in respect of the KERP Summary should be granted;
- (c) the Applicant should be authorized to pay amounts owing for goods and services actually supplied to RCCL prior to the Initial Filing Date, with the consent of the Monitor, where the supplier is, in the opinion of RCCL, critical to its business, ongoing operations or the preservation of its property;
- (d) the ABL Lender's DIP Charge should be approved; and
- (e) the Stay Period should be extended up to and including August 31, 2020.

PART IV - LAW AND ARGUMENT

A. THIS COURT SHOULD EXPAND THE APPLICANT'S RESTRUCTURING CAPABILITIES AND THE MONITOR'S POWERS AND PROTECTIONS

17. Section 11.001 of the CCAA limits the relief sought under an initial order to what is reasonably necessary for the continued operations of a debtor's business during the initial 10-day stay period. As discussed in Chief Justice Morawetz's endorsement in *Lydian International Limited, (Re)* ("**Lydian**"), the appropriate time for the Court to consider expanded relief is at the comeback hearing.⁹

18. In accordance with section 11.001 of the CCAA, the Applicant limited the relief sought in the Initial Order to what was reasonably necessary for the continued operation of its business during the initial ten-day stay period. The Applicant is now seeking to include certain provisions contained in the standard form template CCAA Initial Order developed by the Commercial List Users' Committee of the Ontario Superior Court of Justice (the "**Model Order**").

⁹ [*Lydian International Limited \(Re\)*, 2019 ONSC 473](#) at para 30, Applicant's Book of Authorities at Tab 1.

19. Specifically, RCCL is seeking the inclusion of a standard provision contemplated by the Model Order which permits RCCL to file, subject to further order of this Court, a plan of compromise or arrangement. RCCL is also seeking to include provisions expanding the Monitor's ability to assist with RCCL's restructuring efforts, including, advising RCCL in the development of a plan of compromise or arrangement, and assisting RCCL with holding and administering meetings(s) for voting purposes.¹⁰

20. This Court has granted such expanded restructuring provisions in amended and restated initial orders granted at comeback hearings in recent CCAA proceedings.¹¹

21. The Applicant submits that inclusion of the restructuring and Monitor-related provisions in the Amended and Restated Initial Order are necessary in the circumstances as they will enable RCCL and the Monitor to take certain important steps that may become necessary during the CCAA Proceedings, all with a view towards maximizing value for RCCL's stakeholders.

B. THE KERP AND KERP CHARGE SHOULD BE APPROVED AND THE KERP SUMMARY SHOULD BE SEALED

1. The KERP and KERP Charge Should be Approved

22. This Court has discretion to approve the KERP and grant the KERP Charge, pursuant to its jurisdiction under section 11 of the CCAA – to grant “any order it considers appropriate in the circumstances”.¹²

23. Courts have frequently exercised their discretion to approve key employee retention plans and related charges where “the retention of certain employees has been deemed critical to a successful restructuring”.¹³

¹⁰ Comeback Affidavit, *supra* note 1 at para 12, Motion Record, Tab 2.

¹¹ [2607380 Ontario Inc. \(March 6, 2020\) Toronto, CV-20-00636875-00CL](#) (Amended and Restated Initial Order) at paras 4, 26, Applicant's Book of Authorities at Tab 2; [Cann Trust Holdings Inc. \(April 9, 2020\) Toronto, CV-20-00638930-00CL](#) (Amended and Restated Initial Order) at paras 31 [*Cann Trust*], Applicant's Book of Authorities at Tab 3.

¹² [Companies' Creditors Arrangement Act, RSC 1985, c C-36](#), s 11 [*CCAA*].

¹³ [Timminco Limited \(Re\), 2012 ONSC 506](#) at para 72 [*Timminco*], Applicant's Book of Authorities at Tab 4.

Notably, courts have done so in cases, such as the present, where the proposed key employee retention plan contemplates a range, rather than a fixed number, of potential beneficiaries.¹⁴

24. In *Cinram International*, Justice Morawetz (as he then was) summarized the factors to be considered in determining whether to approve a key employee retention plan and grant a KERP charge:¹⁵

91...The Court in *Re Grant Forest Products Inc.* considered a number of factors in determining whether to grant a KERP and a KERP charge, including:

- (a) whether the Monitor supports the KERP agreement and charge;
- (b) whether the employees to which the KERP applies would consider other employment options if the KERP agreement were not secured by the KERP charge;
- (c) whether the continued employment of the employees to which the KERP applies is important for the stability of the business and to enhance the effectiveness of the marketing process;
- (d) the employees' history and knowledge of the debtor;
- (e) the difficulty in finding a replacement to fulfill the responsibilities of the employees to which the KERP applies;
- (f) whether the KERP agreement and charge were approved by the board of directors, including the independent directors, as the business judgment of the board should not be ignored;
- (g) whether the KERP agreement and charge are supported or consented to by the secured creditors of the debtor; and
- (h) whether the payments under the KERP are payable upon the completion of the restructuring process.

25. In considering these factors, courts have clarified that the “business judgment of the board of directors of the debtor company and the monitor should rarely be ignored”.¹⁶

¹⁴ [Target Canada Co. \(Re\), 2015 ONSC 303](#) at paras 58-59 [*Target*], Applicant's Book of Authorities at Tab 5.

¹⁵ [Cinram International Inc. \(Re\), 2012 ONSC 3767](#) (Comm. List.) at para 37, Schedule “C” at para 91 [*Cinram*], Applicant's Book of Authorities at Tab 6; [Aralez Pharmaceuticals Inc. \(Re\), 2018 ONSC 6980](#) at para 29 [*Aralez*], Applicant's Book of Authorities at Tab 7.

¹⁶ [Aralez](#), *ibid* at para 29, Applicant's Book of Authorities at Tab 7; [Timminco](#), *supra* note 13 at para 73, Applicant's Book of Authorities at Tab 4.

26. In this case, the factors bearing on the approval of the KERP and the granting of the KERP Charge, including the degree to which they are underpinned by objective business judgment of RCCL, are as follows:

- (a) the Monitor supports the KERP and the quantum of the KERP Charge sought under the Amended and Restated Initial Order;
- (b) absent the approval of the KERP and the security provided by the KERP Charge, the KERP beneficiaries are likely to consider other employment options;
- (c) the KERP beneficiaries are critical to the execution and successful completion of RCCL's restructuring and their continued employment is integral to the stability of RCCL during the CCAA Proceedings;
- (d) the KERP beneficiaries have historical knowledge of and familiarity with RCCL's business and operations, and significant experience and expertise that cannot be easily replaced during the CCAA Proceedings;
- (e) it will be disruptive and prohibitively costly to locate suitable replacements for the KERP beneficiaries during the CCAA Proceedings;
- (f) the KERP was developed by RCCL, in consultation with the Monitor, and it was determined that the KERP is reasonably necessary to ensure that the KERP beneficiaries, who occupy key roles within RCCL's supply chain, are retained and don't seek employment elsewhere;
- (g) the KERP, and the timing of the retention payments thereunder, are designed to encourage the continued participation of the KERP beneficiaries during the CCAA Proceedings and following the completion of RCCL's restructuring efforts;

- (h) the KERP, the KERP Charge, and the quantum of the KERP Charge, are contemplated by, and are in compliance with, the terms and conditions of the ABL Forbearance Agreement;
- (i) the KERP and KERP Charge were approved by RCCL's board of directors; and
- (j) notice of the Applicant's motion seeking the KERP Charge will be provided to the secured parties.¹⁷

27. Further, the Applicant submits that the KERP Charge is reasonable having regard to charges approved in similar circumstances,¹⁸ the expertise and experience of the KERP beneficiaries and the complexity of the CCAA Proceedings.

28. Together, the KERP and the KERP Charge will encourage the continued participation of the KERP beneficiaries throughout the CCAA Proceedings. In light of the foregoing, the Applicant submits that the KERP and the KERP Charge are reasonable and appropriate in the circumstances.

¹⁷ Comeback Affidavit, *supra* note 1 at paras 15-16, 22-24, Motion Record at Tab 2; First Report of Richter Advisory Inc., dated July 6, 2020 at paras 32, 35-37, [Monitor's Report].

¹⁸ See for example, *Timminco, supra* note 13 at paras 71-75 where the Court approved a KERP charge of \$269,000, Applicant's Book of Authorities at Tab 4; *Aralez, supra* note 15 at paras 13, 57 where the Court approved a KERP charge to secure payments under a key employee incentive plan for 3 employees in the amount of \$256,710, Applicant's Book of Authorities at Tab 7; *Essar Steel Algoma Inc. Re. 2015 ONSC 7656* at paras 2-3, 11 where the Court approved a KERP charge in the amount of \$3,468,027 to secure payments under a KERP for 23 employees [*Essar Steel*], Applicant's Book of Authorities at Tab 8.

2. The KERP Summary Should be Sealed

29. The Applicant is also requesting that this Court seal the KERP Summary, which is attached as Confidential Appendix “A” to the Applicant’s motion record, pursuant to subsection 137(2) of the *Courts of Justice Act*.¹⁹

30. As the Supreme Court of Canada held in *Sierra Club of Canada v Canada (Minister of Finance)*, courts should exercise their discretion to grant sealing orders where the order is necessary to prevent a serious risk to an important interest, including a commercial interest; and the salutary effects of the order outweigh its deleterious effects.²⁰

31. Orders sealing confidential appendices/supplements relating to key employee retention plans containing sensitive personal and compensation information are routinely granted by this Court.²¹

32. In this case, the KERP Summary reveals individually identifiable information, including compensation information. Disclosure of such sensitive personal and compensation information may cause harm to the KERP beneficiaries and to the Applicant, and protection of such information is an important commercial interest that should be protected. The KERP beneficiaries have a reasonable expectation that their personal information will be kept confidential. Further, given that the material terms of the KERP and details surrounding the calculation of the KERP Charge have been disclosed,²² the salutary effects of the proposed sealing order outweigh any deleterious effects.

33. The Monitor supports the sealing of the KERP Summary for substantially the reasons discussed above.²³

¹⁹ [Courts of Justice Act, RSO 1990, c. C. 43](#), s 137(2).

²⁰ [Sierra Club of Canada v Canada \(Minister of Finance\), 2002 SCC 41](#) at para 53, Applicant’s Book of Authorities at Tab 9.

²¹ [Essar Steel, supra](#) note 18 at para 22, Applicant’s Book of Authorities at Tab 8.

²² Comeback Affidavit, *supra* note 1 at paras 19-20, Motion Record at Tab 2.

²³ Monitor’s Report, *supra* note 17 at para 34.

C. THE APPLICANT SHOULD BE AUTHORIZED TO PAY THE PRE-FILING AMOUNTS OWING TO CERTAIN KEY SUPPLIERS

34. Under the proposed Amended and Restated Initial Order, the Applicant is seeking authorization (but not the requirement) to make certain pre-filing payments in consultation with the ABL Lender, and with the oversight and consent of the Monitor.²⁴

35. This Court has the jurisdiction to authorize a debtor to make certain pre-filing payments in a CCAA proceeding, including to suppliers who are critical to the debtor's continued business operations.²⁵ This Court's jurisdiction to do so is not ousted by the existence of section 11.4 of the CCAA.²⁶ Courts have frequently exercised the jurisdiction to authorize a debtor to satisfy pre-filing obligations in circumstances where the debtor did not seek a charge with respect to its critical suppliers.²⁷

36. In *Cinram International*, Justice Morawetz (as he was then) summarized the factors that the Court has considered:

- (a) whether the goods and services are integral to the debtor's business;
- (b) whether the debtor depends on the uninterrupted supply of such goods or services;
- (c) whether such payment could be made without the Monitor's consent;
- (d) the Monitor support and willingness to work with the debtor to minimize the payments to suppliers for pre-filing obligations;

²⁴ Comeback Affidavit, *supra* note 1 at para 26, Motion Record at Tab 2; *Ibid* at para 39.

²⁵ [Index Energy Mills Road Corporation \(Re\), 2017 ONSC 4944](#) at para 30 [*Index Energy*], Applicant's Book of Authorities at Tab 10.

²⁶ *Cinram*, *supra* note 15 at para 37, Schedule "C" at paras 66-67, Applicant's Book of Authorities at Tab 6; *Index Energy*, *ibid* at para 30, Applicant's Book of Authorities at Tab 10.

²⁷ *Index Energy*, *ibid* at paras 30-32, Applicant's Book of Authorities at Tab 10; [Re Toys "R" Us \(Canada\) Ltd., 2017 ONSC 557](#) at para 9, Applicant's Book of Authorities at Tab 11.

- (e) whether the debtor had sufficient inventory of the goods on hand to meet its needs; and
- (f) the effect on the debtor's ongoing operations and ability to restructure if they were unable to make pre-filing payments to their critical suppliers.²⁸

37. The provision added to the proposed Amended and Restated Initial Order, which authorizes payments to RCCL's critical suppliers, is substantially similar to the language used for such purposes in initial orders as well as amended and restated orders in other CCAA proceedings.²⁹

38. In the circumstances of this case, the factors that support this Court's exercise of discretion to authorize RCCL to pay certain pre-filing amounts, in accordance with the terms set out in the proposed Amended and Restated Initial Order, are as follows:

- (a) RCCL's supply chain and the continued operation of RCCL's business, including its ability to manufacture inventory and distribute its products, depends on receiving an uninterrupted supply of goods and services from a variety of suppliers;
- (b) any interruption in the supply of goods or services to RCCL could have an immediate and materially adverse impact on RCCL's operations, cash flows and business, and in turn jeopardize RCCL's ability to restructure, all of which would be to the detriment of RCCL's stakeholders;
- (c) due to the practical difficulties in enforcing the stay of proceedings extraterritorially and foreign suppliers' lack of familiarity with the CCAA process, the Applicant believes that the

²⁸ *Cinram*, *supra* note 15 at para 68, Applicant's Book of Authorities at Tab 6; *IndexEnergy*, *ibid* at para 31, Applicant's Book of Authorities at Tab 10.

²⁹ *Sears Canada Inc. (June 22, 2017) Toronto, CV-17-11846-00CL* (Initial Order) at para 6(f), Applicant's Book of Authorities at Tab 12; *CannTrust*, *supra* note 11 at para 10(c), Applicant's Book of Authorities at Tab 3; *Toys "R" US (Canada) Ltd. (September 19, 2017) Toronto, CV-17-00582960-00CL* (Initial Order) at para 7(g), Applicant's Book of Authorities at Tab 13.

payment of pre-filing amounts to certain suppliers may be necessary to ensure an uninterrupted supply of goods and services from such suppliers;

- (d) the consent of the Monitor is required for any pre-filing payments to critical suppliers; and
- (e) the Monitor is supportive of this relief, and is willing to work with RCCL to ensure that payments in respect of pre-filing liabilities are appropriate.³⁰

39. Based on the foregoing, the Applicant submits that the relief sought in respect of payments to critical suppliers is appropriate in the circumstances.

D. THIS COURT SHOULD APPROVE THE ABL LENDER'S DIP CHARGE

40. The Initial Order authorized the Applicant to continue to obtain and borrow additional monies under the ABL Agreement. The Applicant is now seeking the ABL Lender's DIP Charge as security for the advances made by the ABL Lender to the Applicant under the ABL Agreement from and after the date of the Amended and Restated Initial Order.

41. Subsection 11.2(1) of the CCAA provides this Court with the jurisdiction to grant the ABL Lender's DIP Charge over the Applicant's Property, "on notice to the secured creditors who are likely to be affected by the security or charge, [...] in favour of a person specified in the order who agrees to lend to the company".³¹ Such a charge may not secure an obligation that exists before the making of an order under subsection 11.2(1).³²

³⁰ Comeback Affidavit, *supra* note 1 at paras 27-30, Motion Record at Tab 2; Monitor's Report, *supra* note 17 at para 40.

³¹ [CCAA](#), *supra* note 12 s 11.2(1).

³² [Ibid.](#)

42. Subsection 11.2(4) of the CCAA provides a non-exhaustive list of factors that courts must consider when determining whether to grant the ABL Lender's DIP Charge, pursuant to section 11.2(2):³³

11.2(4) Factors to be considered— 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.

43. In the present circumstances, the Applicant submits that the following factors support the granting of ABL Lender's DIP Charge and satisfy the criteria set out in section 11.2(1) of the CCAA:

- (a) The period during which RCCL will be subject to the CCAA Proceedings is currently unknown. While RCCL is pursuing its restructuring efforts, it is expected that RCCL will continue its operations. Access to funds, made available to RCCL pursuant to the ABL Agreement and the ABL Forbearance Agreement, is critical to RCCL's ongoing business operations and is necessary to provide RCCL with sufficient liquidity while it pursues its restructuring efforts.

³³ *ibid.* s 11.2(2).

- (b) The granting of the ABL Lender's DIP Priority Charge is a term of the ABL Forbearance Agreement and the ABL Lender has informed RCCL that it expects that the ABL Lender's DIP Charge will be sought in the Amended and Restated Initial Order.
- (c) The ABL Lender's DIP Charge will stand as security for advances made to RCCL after the date of the Amended and Restated Initial Order, and will not secure an obligation that existed before the granting of the Amended and Restated Initial Order.
- (d) The ABL Lender's DIP Charge is for the benefit of RCCL's primary secured creditor. Notice of the Applicant's motion will be provided to the other secured creditor of RCCL.
- (e) The Monitor is supportive of the ABL Lender's DIP Charge and will continue to supervise RCCL's cash flows, expenses and disbursements in accordance with the Amended and Restated Initial Order.³⁴

44. For all of the foregoing reasons, the Applicant submits that this Court should grant the ABL Lender's DIP Charge on the terms sought under the Amended and Restated Initial Order.

E. THIS COURT SHOULD EXTEND THE STAY PERIOD

45. The Stay Period expires on July 9, 2020. Section 11.02(2) of the CCAA gives this Court the authority to grant an extension of the Stay Period for "any period that the court considers necessary".³⁵ In determining whether such an extension should be granted, this Court must be satisfied that: (a) circumstances exist that make such an order appropriate; and (b) the Applicant has acted, and is acting in good faith and with due diligence.³⁶

³⁴ Comeback Affidavit, *supra* note 1 at paras 33, 35-38, Motion Record at Tab 2; Monitor's Report, *supra* note 17 at paras 41-42.

³⁵ [CCAA](#), *supra* note 12 s 11.02(2).

³⁶ [Ibid.](#) s 11.2(2), s 11.2(3)

46. The Applicant is seeking to extend the Stay Period to and including August 31, 2020. The following factors support the granting of the Stay Extension:

- (a) Since the Initial Order was granted, the Applicant has acted and continues to act in good faith and with due diligence. The Applicant has, with the oversight and assistance of the Monitor, worked to stabilize RCCL's business by undertaking the activities described in paragraph 9 of the Comeback Affidavit. The Applicant has also continued to engage with its primary lender and its various stakeholders regarding a viable path forward with respect to RCCL's restructuring.
- (b) The extension of the Stay Period will allow RCCL sufficient run way to consider its restructuring alternatives and attempt to implement a viable path forward that maximizes recoveries for all stakeholders.
- (c) Subject to obtaining the relief sought in the Amended and Restated Initial Order, the Applicant is anticipated to have sufficient cash to support its ordinary course business operations and the CCAA Proceedings during the extended Stay Period.
- (d) The Monitor is supportive of extending the Stay Period.
- (e) The Applicant believes that no creditor will suffer material prejudice as a result of the extension of the Stay Period.³⁷

47. For these reasons, the Applicant submits that the extension of the Stay Period up to and including August 31, 2020 is appropriate in the circumstances.

³⁷ Comeback Affidavit, *supra* note 1 at paras 9, 40-44, Motion Record at Tab 2; Monitor's Report, *supra* note 17 at para 44.

PART V - ORDER REQUESTED

48. For the foregoing reasons, RCCL respectfully requests that this Honourable Court grant an Order substantially in the form of the draft Amended and Restated Initial Order at Tab 3 of the Applicant's Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 6th day of July, 2020.



July 6, 2020

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SCHEDULE A – LIST OF AUTHORITIES

Cases Cited

1. [*Aralez Pharmaceuticals Inc, \(Re\), 2018 ONSC 6980*](#)
2. [*CannTrust Holdings Inc, \(April 9, 2020\) Toronto, CV-20-00638930-00CL \(Amended and Restated Initial Order\)*](#)
3. [*Cinram International Inc \(Re\), 2012 ONSC 3767*](#)
4. [*Essar Steel Algoma Inc, Re, 2015 ONSC 7656*](#)
5. [*Index Energy Mills Road Corporation \(Re\), 2017 ONSC 4944*](#)
6. [*Lydian International Limited \(Re\), 2019 ONSC 473*](#)
7. [*Re Toys “R” US \(Canada\) Ltd., 2017 ONSC 5571*](#)
8. [*Sears Canada Inc, \(June 22, 2017\) Toronto, CV-17-11846-00CL \(Initial Order\)*](#)
9. [*Sierra Club of Canada v Canada \(Minister of Finance\), 2002 SCC 41*](#)
10. [*Target Canada Co, Re, 2015 ONSC 303*](#)
11. [*Timminco Limited \(Re\), 2012 ONSC 506*](#)
12. [*Toys "R" US \(Canada\) Ltd, \(September 19, 2017\) Toronto, CV-17-00582960-00CL \(Initial Order\)*](#)
13. [*2607380 Ontario Inc, \(March 6, 2020\) Toronto, CV-20-00636875-00CL \(Amended and Restated Initial Order\)*](#)

SCHEDULE B – RELEVANT STATUTES

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

Section 11

General Power of Court

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.

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 11.2

Interim financing

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

Priority — secured creditors

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

Priority — other orders

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

Factors to be considered

(4) In deciding whether to make an order, the court is to consider, among other things,

(a) the period during which the company is expected to be subject to proceedings under this Act;

(b) how the company's business and financial affairs are to be managed during the proceedings;

(c) whether the company's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

(e) the nature and value of the company's property;

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the monitor's report referred to in paragraph 23(1)(b), if any.

Additional factor — initial application

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

Section 11.4

Critical Supplier

(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

(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

(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

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

Courts of Justice Act RSO 1990, c. 43

Section 137

Documents Public

(1) On payment of the prescribed fee, a person is entitled to see any document filed in a civil proceeding in a court, unless an Act or an order of the court provides otherwise.

Sealing documents

(2) A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.

Court lists public

(3) On payment of the prescribed fee, a person is entitled to see any list maintained by a court of civil proceedings commenced or judgments entered.

Copies

(4) On payment of the prescribed fee, a person is entitled to a copy of any document the person is entitled to see.

**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

FACTUM OF THE APPLICANT
(Amended and Restated Initial Order)
(Returnable July 8, 2020)

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