Court File No.

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 GRAFTON-FRASER INC.

(the "Applicant")

FACTUM OF THE APPLICANT

(Initial Application returnable January 25, 2017)
(Motion for Approval of Stalking Horse Agreement, SISP & Liquidation Consulting Agreement returnable January 30, 2017)

Dated: January 25, 2017

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TO: THE SERVICE LIST

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PART I - OVERVIEW[1]

1. This factum is delivered in connection with an application by Grafton-Fraser Inc. (the "**Company**") for relief in the form of an initial order ("**Initial Order**") under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C.36, as amended (the "**CCAA**"). The Initial Application is returnable January 25, 2017.

2. This factum is also delivered in connection with a motion brought by the Company, served contemporaneously with the Application and returnable January 30, 2017 (subject to the Initial Order being granted by the Court), for orders, *inter alia*, approving the execution of Stalking Horse Agreement, the proposed SISP, and the Liquidation Consulting Agreement (each as defined below).

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[1] Capitalized terms used herein but not otherwise defined have the meanings ascribed to them in the Affidavit of Mark Sun, sworn January 25, 2017 in support of the Initial CCAA Order (the "**Sun Affidavit**").

3. The Company is a leading Canadian retailer of men's clothing that operates 158 stores in Canada under the "Tip Top Tailors", "George Richards Big and Tall", "Mr. Big and Tall" and "Kingsport Big and Tall Clothier" banners.[2]

4. The Company is facing a liquidity crisis as a result of, among other things, financial consequences arising from the insolvency of its wholly-owned subsidiary 2473304 Ontario Inc. ("**247**"), lower than expected retail sales, increased overhead costs, delays in receipt of seasonal inventory and turnover of key personnel.[3]

5. As of January 21, 2017 the Company was indebted, on a secured basis, to CIBC in the approximate amount of $12.8 million and, as co-borrower with 247, is liable for approximately $1.6 million of 247's indebtedness under the CIBC Credit Agreement. In addition to its indebtedness to CIBC, the Company is also indebted to lenders affiliated with GSO Capital Partners LP ("**GSO**") under the GSO Credit Agreement in the approximate amount of $39.4 million.[4]

6. The Company entered into forbearance agreements, as amended from time to time, with CIBC and with GSO, respectively, in connection with 247's CCAA proceedings. The Company is dependent on continued forbearance from CIBC and GSO as it does not have sufficient liquidity to repay amounts outstanding under the CIBC Credit Agreement and the GSO Credit Agreement.[5]

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2 Sun Affidavit, para 5; Application Record, Tab 2.

3 Sun Affidavit, paras 6-10; Application Record, Tab 2.

4 Sun Affidavit, para 11; Application Record, Tab 2.

5 Sun Affidavit, para 12; Application Record, Tab 2.

7. On or about January 24, 2017, the Company entered into amended and restated forbearance agreements with CIBC and with GSO, respectively, each of which contemplate, among other things, the Company executing the Stalking Horse Agreement and pursuing the SISP in the context of CCAA proceedings.[6]

8. The forbearance agreement with CIBC (referred to herein as the "**ABL DIP Forbearance Agreement**") further contemplates that CIBC will continue to make its revolving asset-based loan facilities available to the Company during these CCAA proceedings, subject to a number of terms and conditions, including that CIBC be granted the ABL Lender's DIP Charge (as defined below) in respect of advances it makes to the Company during these proceedings. Among other terms, it is a condition of the ABL DIP Forbearance Agreement that the Company execute the Stalking Horse Agreement and pursue the SISP in the context of CCAA proceedings.[7]

9. The Company has also entered into a term sheet with GSO, among others (the "**DIP Agreement**"), pursuant to which GSO and certain other entities related to it (the "**Term DIP Lenders**") have agreed to advance to the Company interim financing in the amount of up to $5.5 million to provide additional funding for the Company's operations during the CCAA proceeding, subject to obtaining Court approval of the DIP Agreement and obtaining the Term Lenders' DIP Charge (as defined below). It is also a condition of the DIP Agreement, among other conditions, that the Company obtain a Court order recognizing the Stalking Horse Agreement as a "stalking horse bid" and approving the SISP.[8]

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6 Sun Affidavit, para 13; Application Record, Tab 2.

7 Sun Affidavit, para 14; Application Record, Tab 2.

8 Sun Affidavit, para 15; Application Record, Tab 2.

10. The Company, with the assistance of the retail consulting group at Richter Consulting Canada Inc. (the "**Retail Consultant**"), has developed a process of soliciting offers for a sale of, or investment in the Company, its business and assets (the "**SISP**"). As part of that process, the Company has entered into an asset purchase agreement (the "**Stalking Horse Agreement**") for the sale of all or substantially all of its assets to 1104307 B.C. Ltd. (a company related to GSO) (the "**Stalking Horse Purchaser**") by way of a "credit bid".[9]

11. The Stalking Horse Agreement will, subject to Court approval, serve as the "stalking horse credit bid" in the proposed SISP.[10]

12. In conjunction with the proposed restructuring transaction to be carried out through the SISP, the Company, in consultation with the Retail Consultant, has determined that it is in the best interests of the Company's stakeholders to liquidate the inventory and owned furniture fixtures and equipment ("**FF&E**") at a number of the poorest performing stores (which the Stalking Horse Purchaser has indicated it will not assume on existing lease terms) pursuant to and in accordance with the Liquidation Consulting Agreement.[11]

13. The Company is not able to successfully restructure its affairs outside of formal insolvency proceedings. The Company is insolvent and unable to meet its liabilities as they become due. The Company requires the protection and other provisions of an initial order under the CCAA to provide it with a stable environment to preserve its value for its stakeholders while the Company liquidates the merchandise and FF&E at certain underperforming stores and

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[9] Sun Affidavit, para 16; Application Record, Tab 2.

[10] Sun Affidavit, para 17; Application Record, Tab 2.

[11] Sun Affidavit, para 18; Application Record, Tab 2.

pursues the proposed SISP, and to allow the Company to consummate any transaction(s) arising thereunder.[12]

PART II - THE FACTS

14. The facts with respect to this Application are more fully set out in the Affidavit of Mark Sun sworn January 25, 2017 in support of this CCAA filing (the "**Sun Affidavit**"). The facts relevant to specific issues herein are reviewed in the submissions relating to such issues.

PART III - ISSUES

15. The issue to be determined is whether the Court should grant the relief being sought by the Company. The relief sought by the Company includes, *inter alia*:

(a) declaring that the Company is a company to which the CCAA applies;

(b) granting a stay of proceedings in favour of the Company and its directors and officers;

(c) authorizing payments to critical vendors;

(d) approving the DIP Agreement and granting the Term Lenders' DIP Charge;

(e) approving the ABL DIP Forbearance Agreement and granting the ABL Lender's DIP Charge;

(f) granting the Administration Charge (as defined below);

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[12] Sun Affidavit, para 19; Application Record, Tab 2.

(g) declaring that the directors and officers of the Company shall be indemnified against obligations and liabilities that they may incur in their capacity as directors or officers of the Company after the commencement of these proceedings, and granting the D&O Charge (as defined below) as security for such indemnity;

(h) authorizing the KERPs and granting the KERP Charge (each as defined below) as security for the Company's obligations in respect of the KERPs;

(i) appointing Richter Advisory Group Inc. ("**Richter**" or the "**Proposed Monitor**") to act as the monitor (the "**Monitor**") of the Company in these CCAA proceedings;

(j) approving the execution of the Stalking Horse Agreement and proposed SISP with respect to the business and assets of the Company; and

(k) approving the Liquidation Consulting Agreement and the Sale Guidelines.

16. The Company submits that this Application (and the Motion to approve the Stalking Horse Agreement, SISP and Liquidation Consulting Agreement) should be granted on the following basis:

(a) this Application complies with all requirements of the CCAA;

(b) the relief sought is consistent with the purpose of the CCAA;

(c) the relief sought is available under the CCAA; and

(d) the factual matrix supports the granting of the order.

PART IV - THE LAW

A. THIS APPLICATION COMPLIES WITH ALL REQUIREMENTS OF THE CCAA

A.1. This Application Concerns a Debtor Company with Debts over $5 Million

17. Section 3(1) of the CCAA states that the statute applies in respect of a "debtor company" if the total claims against the "debtor company" are more than $5,000,000.

(a) The Applicant is a "Company"

18. Section 2(1) of the CCAA sets out the definition of "company" as follows:

> *"2(1) **"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, railway or telegraph companies, insurance companies and companies to which the Trust and Loan Companies Act applies;"*

Section 2(1), *Companies' Creditors Arrangement Act*, RSC 1985, c C.36, as amended; Factum of the Applicant, Schedule B.

19. The Company is the product of an amalgamation resulting from articles of amalgamation filed under the *Business Corporations Act* (Ontario) and does not fall within the excluded categories of "company" listed in the above definition. The Company is a "company" within the meaning of the CCAA definition.[13]

(b) The Applicant is a "Debtor Company"

20. Section 2(1) of the CCAA defines a "debtor company" as follows:

> *"2(1) **"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*

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[13] Sun Affidavit, para 20; Application Record, Tab 2.

> *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."*

Companies' Creditors Arrangement Act, supra **at section 2(1); Factum of the Applicant, Schedule B.**

21. There is no definition of "insolvent" in the CCAA. There is a definition of "insolvent person" under the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 (the "**BIA**") and it has become common practice to refer to this BIA definition when reference is made to insolvency in the context of the CCAA.

Re Stelco Inc. **(2004), 48 CBR (4th) 299 (Ont Sup Ct J [Commercial List]) at paras 21-22; leave to appeal to CA ref'd, [2004] OJ No 1903; leave to appeal to SCC ref'd [2004] SCCA No 336 [*Re Stelco*]; Book of Authorities of the Applicant, Tab 1.**

22. The definition of "insolvent person" under the BIA is as follows:

> *"2* ***"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."*

Section 2, *Bankruptcy and Insolvency Act,* RSC 1985, c B-3, as amended; Factum of the Applicant, Schedule B.

23. A debtor need only meet one of the three prongs of the above referenced test to be determined to be "insolvent" for the purposes of the CCAA.

Re Stelco, supra **at para 28; Book of Authorities of the Applicant, Tab 1.**

24. The Company is indebted to CIBC and does not have sufficient liquidity to repay the outstanding indebtedness to CIBC in full if CIBC should make a demand for repayment.[14]

25. The Company is also indebted to GSO, among others, under the GSO Credit Agreement and the Company is unable to satisfy this obligation in full if required by GSO.[15]

26. Its credit facility with CIBC and GSO are the subject of defaults and in forbearance. The Company is also indebted to its suppliers and other trade creditors in the amount of approximately $4.5 million.[16]

27. As a result, the Company is unable to meet its obligations to creditors as they come due and has ceased meeting such obligations. The Company is therefore insolvent.[17]

(c) The Claims Against the Applicant Exceed $5 Million

28. The amount of debt for which the Applicant is liable is significantly in excess of the $5 million threshold as provided for in the CCAA.

29. As of January 21, 2017 there was approximately $14.4 million (including accrued interest) outstanding under the CIBC Credit Agreement.[18]

30. The Company is also indebted to GSO under the GSO Credit Agreement in the approximate amount of $39.4 million (including accrued interest) as at January 21, 2017.[19]

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[14] Sun Affidavit, para 119; Application Record, Tab 2.
[15] Sun Affidavit, para 118; Application Record, Tab 2.
[16] Sun Affidavit, para 52; Application Record, Tab 2.
[17] Sun Affidavit, para 120; Application Record, Tab 2.
[18] Sun Affidavit, para 119; Application Record, Tab 2.
[19] Sun Affidavit, para 118; Application Record, Tab 2.

B. THE RELIEF SOUGHT IS CONSISTENT WITH THE PURPOSE OF THE CCAA

31. In addition to complying with the technical requirements of the CCAA, this application is consistent with the purpose underlying the Act.

32. In *Century Services Inc. v. Canada (Attorney General),* the Supreme Court of Canada canvassed the purpose and policy behind the CCAA and identified the following salient features:

(a) the purpose of the CCAA is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets (para 15);

(b) the CCAA's distinguishing feature is a grant of broad and flexible authority to the supervising court to make the order necessary to facilitate the reorganization of the debtor and achieve the CCAA's objectives. The courts have used CCAA jurisdiction in increasingly creative and flexible ways (para 19);

(c) CCAA decisions are often based on discretionary grants of jurisdiction. The incremental exercise of judicial discretion in commercial courts has been the primary method by which the CCAA has been adapted and has evolved to meet contemporary business and social needs (para 58);

(d) judicial discretion must of course be exercised in furtherance of the CCAA's purposes (para 59);

(e) judicial decision making under the CCAA takes many forms. A court must first of all provide the conditions under which the debtor can attempt to reorganize. This

can be achieved by staying enforcement actions by creditors to allow the debtor's business to continue, preserving the status quo while the debtor plans the compromise or arrangement to be presented to creditors, and supervising the process and advancing it to the point where it can be determined whether it will succeed (para 60);

(f) in doing so, the court must often be cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors to include employees, directors, shareholders, and even other parties doing business with the insolvent company (para 60); and

(g) CCAA courts have been called upon to innovate in exercising their jurisdiction beyond merely staying proceedings against the debtor to allow breathing room for reorganization (para 61).

***Century Services Inc. v Canada (Attorney General)*, 2010 SCC 60, [2010] 3 SCR 379; Book of Authorities of the Applicant, Tab 2.**

33. The Applicant is seeking protection from its creditors to provide it with a stable environment to allow it to preserve its value for its stakeholders while the Company pursues the SISP and the concurrent liquidation of certain non-performing stores, and to allow the Company to consummate any transaction(s) arising from the SISP.[20]

34. In appropriate circumstances, the purpose of the CCAA can be utilized to effect a liquidation of a debtor company's assets.

***Re Target Canada Co.*, 2015 ONSC 303, 22 CBR (6th) 323 [Commercial List] at para 33 [*Re Target*]; Book of Authorities of the Applicant, Tab 3.**

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[20] Sun Affidavit, para <@>; Application Record, Tab 2.

Re Anvil Range Mining Corp, (2002) 34 CBR (4th) 157 at para 32, Book of Authorities of the Applicant, Tab 4.

Re First Leaside Wealth Management Inc., 2012 ONSC 1299, 213 ACWS (3d) 266 [Commercial List] at paras 32-37; Book of Authorities of the Applicant, Tab 5.

Re Lehndorff General Partner Ltd, (1993), 17 CBR (3d) 24 (Ont Sup Ct J [Commercial List]) at para 7; Book of Authorities of the Applicant, Tab 6.

Lloyd W Houlden, Geoffrey B Morawetz & Janis P Sarra, _The 2015-2016 Annotated Bankruptcy and Insolvency Act_, (Toronto: Carswell, 2014) at N§2, p 1219; Book of Authorities of the Applicant, Tab 7.

35. The Company determined, with the assistance of the Retail Consultant, that negotiating a stalking horse transaction was the best course of action to maximize value for its stakeholders, culminating in the Stalking Horse Agreement and proposed SISP to be undertaken in restructuring proceedings under the CCAA, coupled with the liquidation of assets located at underperforming store locations pursuant to and in accordance with the Liquidation Consulting Agreement.[21]

36. The Stalking Horse Agreement will provide the Company's stakeholders with assurance that the business conducted by the Company will continue as a going-concern. The Stalking Horse Agreement will also provide for the continuation of a substantial portion of the Company's business, thereby assuring a customer for suppliers, a tenant for landlords, employment for a majority of the Company's employees, and an ongoing business for its many customers.[22]

37. The SISP provides a means for testing the market, gauging interest in the Company and its assets and determining whether a transaction is available that is more advantageous to the Company and its stakeholders than the Stalking Horse Agreement.[23]

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[21] Sun Affidavit, para 87; Application Record, Tab 2.

[22] Sun Affidavit, paras 148-149; Application Record, Tab 2.

[23] Sun Affidavit, paras 150; Application Record, Tab 2.

38. The Company cannot meet its liabilities as they come due and, without the protection of the CCAA and the benefit of the DIP Agreement and the ABL DIP Forbearance Agreement, the ability of the Company to undertake the SISP for the benefit of its stakeholders may be seriously impaired.[24]

39. In the circumstances, the Applicant submits that the relief requested herein is consistent with the purpose of the CCAA.

C. THIS RELIEF SOUGHT IS AVAILABLE UNDER THE CCAA

C.1. The Court has Jurisdiction to Receive the Application

40. The jurisdiction of a court to receive a CCAA application is set out in section 9(1) of the CCAA:

> *"**9(1) Jurisdiction of court to receive applications** - 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."*

***Companies' Creditors Arrangement Act, supra* at section 9(1); Factum of the Applicant, Schedule B.**

41. The head office of the Company is located in Toronto, Ontario and its chief place of business is also in Ontario, where 74 of its 158 retail stores are located.[25]

C.2. The Court Should Grant a Stay of Proceedings in Favour of the Applicant and its Directors and Officers

42. The Applicant is seeking a court ordered stay of proceedings in favour of the Company and its directors and officers. Section 11.02(1) of the CCAA provides statutory jurisdiction for the court to grant a stay of proceedings in an Initial Order:

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[24] Sun Affidavit, para 120; Application Record, Tab 2.

[25] Sun Affidavit, paras 20 and 24; Application Record, Tab 2.

> *"**11.02(1) Stay etc. - initial application** - 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 30 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."*

Companies' Creditors Arrangement Act, supra **at section 11.02(1); Factum of the Applicant, Schedule B.**

43. The stay of proceedings restrains judicial or extra-judicial conduct that could impair the ability of the debtor to operate its business or to focus its efforts on restructuring its affairs. The purpose of the stay of proceedings is to maintain the *status quo* so that steps can be taken under the CCAA for the benefit of all creditors.

Toronto Stock Exchange Inc v United Keno Hill Mines Ltd **(2000), 19 CBR (4th) 299 (Ont Sup Ct J [Commercial List]) at para 11; Book of Authorities of the Applicant, Tab 8.**

Re Northland Properties Ltd **(1988), 73 CBR (NS) 141 (BCSC) at para 18; Book of Authorities of the Applicant, Tab 9.**

44. The stay provisions of the CCAA are discretionary and extraordinarily broad. The power to grant the stay is to be interpreted broadly in order to permit the CCAA to accomplish its legislative purpose.

Re Canwest Global Communications Corp **(2009), 61 CBR (5th) 200 (Ont Sup Ct J [Commercial List]) at paras 27-28; Book of Authorities of the Applicant, Tab 10.**

45. The Company is indebted to its suppliers and other trade creditors in the amount of approximately $4.5 million, and its credit facility with CIBC and GSO are the subject of

defaults and in forbearance. Without the benefit of a stay of proceedings, which is a requirement of the DIP Agreement and the Forbearance Agreements, creditors and contractual counterparties may seek to exercise remedies against the Company.[26]

46. The Company requires an immediate stay of proceedings to provide it with stability so that it can maintain the status quo which will allow the Company to focus its efforts on the SISP.[27]

47. The Company is seeking customary provisions staying all proceedings against the directors and officers of the Company with respect to all claims against the directors or officers that relate to any obligations of the Company whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers of the Company.[28]

48. Section 11.03(1) provides express statutory jurisdiction to extend the stay of proceedings in favour of directors:

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

49. The stay of proceedings against the Company's officers and directors is required to ensure that they are able to focus their efforts on the restructuring and related activities and to prevent creditors and others from seeking to do indirectly what they cannot do directly by

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[26] Sun Affidavit, para 52; Application Record, Tab 2.

[27] Sun Affidavit, para 137; Application Record, Tab 2.

[28] Sun Affidavit, para 168; Application Record, Tab 2.

asserting claims or other relief relating to the debts and obligations of the Company against its officers and directors.[29]

50. The liquidity position of the Company is dire and the stay of proceedings, DIP Agreement and forbearance agreement approvals, and other relief sought in this application is urgently needed in the interest of the Company and its stakeholders. The stay of proceedings will benefit not only the Company and its financial creditors, but also its store-level employees (the majority of which will continue to be employed), customers and other stakeholders.

C.3. The Court Should Permit the Applicant to Make Pre-Filing Payments

51. The Company is seeking permission to make pre-filing payments to certain vendors that are critical to the Company's ongoing operation. These payments must be paid following the date of the Initial Order to prevent significant impairment of the Company's business.

52. CCAA courts have inherent jurisdiction to permit payments in respect of pre-filing obligations to persons whose services are critical to the ongoing operations of a debtor company.

> ***Re Canwest Global Communications Corp* (2009), 59 CBR (5th) 72 (Ont Sup Ct J [Commercial List]) at paras 41-43 [*Re Canwest*]; Book of Authorities of the Applicant, Tab 11**
>
> ***Re Northstar Aerospace Inc*, 2012 ONSC 4546, (2012), 222 ACWS (3d) 587 (Ont Sup Ct J [Commercial List]) at paras 12-15 [*Northstar*]; Book of Authorities of the Applicant, Tab 12**

53. Section 11.4 of the CCAA was enacted as part of the 2009 amendments and specifically addresses critical suppliers as follows:

> *"**11.4(1) Critical supplier** - On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security*

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[29] Sun Affidavit, para 138; Application Record, Tab 2.

> *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.*
> ***(2) Obligation to supply** - 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.*
> ***(3) Security or charge in favour of critical supplier** - 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.*
> ***(4) Priority** - The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.*

***Companies' Creditors Arrangement Act, supra* at section 11.4; Factum of the Applicant, Schedule B**

54. In the present matter, the Company is not seeking an order compelling the continued supply of goods or services and it is not requesting a critical supplier charge pursuant to section 11.4 of the CCAA. It is the Company's position that section 11.4 of the CCAA does not apply in these circumstances. In any event, the order being sought to allow the Company to make payments for pre-filing amounts owing to certain vendors and service providers that, in the opinion of the Company (and with the consent of the Monitor), are critical to their business and ongoing operations, is consistent with the purpose of section 11.4 of the CCAA.

***Re Canwest, supra* at paras 42-43; Book of Authorities of the Applicant, Tab 11**

***Re Canwest Publishing Inc*, 2010 ONSC 222, [2010] OJ No 188 (Ont Sup Ct J [Commercial List]) at paras 49-51 [*Canwest Publishing*]; Book of Authorities of the Applicant, Tab 13.**

55. The enactment of section 11.4 of the CCAA has not ousted the court's discretionary authority or inherent jurisdiction to authorize a debtor to pay pre-filing amounts

where they are not seeking a charge in respect of critical suppliers. In *Re Cinram International Inc.*, Morawetz J. adopted the following statement from the applicant's factum:

> *"This jurisdiction of the Court is not ousted by Section 11.4 of the CCAA, which became effective as part of the 2009 amendments to the CCAA and codified the Court's practice of declaring a person to be a critical supplier and granting a charge on the debtor's property in favour of such critical supplier. As noted by Pepall J. in Canwest Global Communications Corp., Re, the recent amendments, including Section 11.4, do not detract from the inherently flexible nature of the CCAA or the Court's broad and inherent jurisdiction to make such orders that will facilitate the debtor's restructuring of its business as a going concern. [Emphasis added]"*

This summary of the law was also adopted by Brown J. in *Re Northstar Aerospace Inc.*

> ***Re Cinram International Inc*, 2012 ONSC 3767, 91 CBR (5th) 46 [Commercial List] at paras 37 and at para 67 of Sched. C; Book of Authorities of the Applicant, Tab 14.**
>
> ***Northstar, supra* at para 11; Book of Authorities of the Applicant, Tab 12.**

56. The Company is dependent on the continued supply of product from its vendors to ensure that it has sufficient inventory to meet the needs of its customers. Disruption to the continued supply of inventory from some of these vendors could severely impact the ongoing financial performance of the Company. The continued supply of goods and services from these parties is critical to the Company's ongoing operations.[30]

57. The Company is therefore requesting that it be permitted to pay pre-filing amounts owing to those vendors that the Company deems critical to its operations in the maximum aggregate amount of $1 million, subject to the express approval of the Monitor or Order of the Court.[31]

C.4. The Court Should Approve the DIP Agreement & Term Lenders' DIP Charge and the ABL DIP Forbearance Agreement & ABL Lender's DIP Charge

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30 Sun Affidavit, para 37; Application Record, Tab 2.

31 Sun Affidavit, para 38; Application Record, Tab 2.

58. The Company seeks the Court's approval of two separate but coordinated interim financing agreements, being the DIP Agreement & the ABL DIP Forbearance Agreement. Availability under each of these interim financing agreements is tied to the Approved Cash Flow (as defined therein).

59. The Company also seeks a priority Court-ordered charge on all the assets, rights, undertakings and properties of the Company (the "**Property**") as security for amounts advanced to the Company under the DIP Agreement (the "**Term Lenders' DIP Charge**") and under the ABL DIP Forbearance Agreement, respectively, (the "**ABL Lender's DIP Charge**", and together with the Term Lenders' DIP Charge, the "**DIP Charges**").

60. It is a condition of any advance under the DIP Agreement that, in addition to its existing contractual security, GSO be granted the Term Lenders' DIP Charge.[32]

61. It is also a condition of the ABL DIP Forbearance Agreement that CIBC maintain its priority in the ABL Priority Collateral and be granted the ABL Lender's DIP Charge.[33]

62. The Term DIP Lenders and CIBC have advised the Company that they will not advance any funds under the DIP Agreement or the ABL DIP Forbearance Agreement, respectively, unless the Court approves the Term Lenders' DIP Charge and the ABL Lender's DIP Charge.[34]

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[32] Sun Affidavit, para 154; Application Record, Tab 2.

[33] Sun Affidavit, para 155; Application Record, Tab 2.

[34] Sun Affidavit, para 157; Application Record, Tab 2.

63. Section 11.2 of the CCAA expressly authorizes the Court to approve interim financing and to make an order declaring that all or part of the property of the debtor is subject to a priority DIP charge:

> *"**11.2(1) Interim financing** - 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.*
>
> ***11.2(2) Priority - secured creditors** - The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.*
>
> ***11.2(3) Priority - other orders** - 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."*

***Companies' Creditors Arrangement Act, supra* at section 11.2; Factum of the Applicant, Appendix B.**

64. Section 11.2(4) sets out the factors that a court shall consider when making a DIP order:

> *"**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."*

***Companies' Creditors Arrangement Act, supra* at section 11.2(4); Factum of the Applicant, Appendix B.**

65. In *Canwest Global Communications Corp.*, Pepall J. emphasized the importance of meeting the criteria set out in section 11.2(1) before turning to consider the enumerated factors in section 11.2(4). Hence, the first issues that a court must determine are:

(a) that notice has been given to secured creditors likely to be affected by the DIP charge;

(b) that the amount to be granted under the proposed DIP financing facility be appropriate and required having regard to the debtors' cash-flow statement; and

(c) that the DIP charge does not secure an obligation that existed before the DIP order was made.

***Re Canwest, supra* at paras 31-35; Book of Authorities of the Applicant, Tab 11.**

66. In the current application, the following factors support the granting of the DIP Charges and satisfy the criteria set out above at section 11.2(1) of the CCAA:

(a) CIBC and GSO are amenable to the DIP Charges. The only other secured creditors of the Company appear to be Xerox Canada Ltd. ("**Xerox**"), Canadian Dealer Lease Services Inc. ("**CDLS**") and Bank of Nova Scotia-DLAC ("**BNS**") (in Ontario only) with respect to its interest in specific collateral. The court-ordered charges sought by the Company in this Application are not proposed, at this time, to rank in priority to the registration in favour of Xerox, CDLS or BNS, to the extent they represent validly perfected and enforceable security interests;[35]

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[35] Sun Affidavit, para 158; Application Record, Tab 2.

(b) the ABL DIP Forbearance Agreement allows the Company to continue to borrow under the CIBC Credit Agreement in an amount not to exceed the lesser of $25,000,000 million and the Company's borrowing base formula as set forth in the Approved Cash Flow, to fund the Company's operations during the CCAA proceedings. The maximum amount available to the Company under the DIP Agreement is $5.5 million to fund the portion of the cash requirements of the business in accordance with the Approved Cash Flow. The cash-flow statement that was filed with this Application (the "**Cash Flow Statement**") indicates that, assuming the DIP Agreement and the ABL DIP Forbearance Agreement are approved and funds are advanced to the Company in accordance with their terms, the Company will have sufficient liquidity to fund its ongoing operations while pursuing the restructuring throughout the projected cash-flow period;[36] and

(c) the DIP Charges will not secure the Company's pre-filing obligations.

67. The ABL DIP Forbearance Agreement is an amended version of the pre-filing CIBC Credit Agreement which provides that cash generated from the Company's operations will be used to reduce pre-filing amounts owing under the CIBC Credit Agreement (and thus increase the amount of funds available under the DIP facility). It is an express term of the ABL DIP Forbearance Agreement that advances made thereunder cannot be used to satisfy pre-filing obligations under the CIBC Credit Agreement, respectively.[37]

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[36] Sun Affidavit, paras 64, 128, 132 and 160(a); Application Record, Tab 2.

[37] Sun Affidavit, para 129; Application Record, Tab 2.

68. CCAA Courts have previously approved similarly structured DIP facilities and accepted that the use of cash generated from the debtor company's business to reduce amounts owing under the pre-filing credit facility did not contravene section 11.2(1) of the CCAA.

> ***Re Performance Sports Group Ltd.*, 2016 ONSC 6800 [Commercial List] at para 22; Book of Authorities of the Applicant, Tab 15.**
>
> ***Re Comark Inc*, 2015 ONSC 2010 [unreported] [Commercial List] at paras 26-29; Book of Authorities of the Applicant, Tab 16.**

69. The following additional factors support the granting of the DIP Charges and satisfy the criteria set out above at section 11.2(4) of the CCAA:

(a) the period during which the Company will be subject to CCAA proceedings is currently unknown. The outside deadline for submission of binding offers under the SISP is 5:00 p.m. (Eastern Time) on March 24, 2017. If the Stalking Horse Agreement is selected as the successful bid under the SISP, the closing of the transaction contemplated therein is expected to be in May 2017;[38]

(b) it is expected that the Company will continue to operate the majority of its stores, with continued employment of related store-level employees and ongoing payment of rents, while it pursues the SISP;[39]

(c) the Company has the support of its primary secured creditors CIBC and GSO;[40]

(d) as the existing secured lenders with first registered security on the assets of the Company, CIBC and GSO, are best positioned to provide the interim financing on commercially reasonable terms;[41]

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38 Sun Affidavit, paras 96 and 109; Application Record, Tab 2.

39 Sun Affidavit, para 160(b); Application Record, Tab 2.

40 Sun Affidavit, para 160(c); Application Record, Tab 2.

(e) interim financing is necessary to permit the Company to maintain its operations while it pursues the SISP;[42]

(f) CIBC and GSO are the Company's two principal secured creditors and each has agreed to the DIP Charges;[43]

(g) CIBC and the Term Lenders are not prepared to advance the proposed DIP facilities if the DIP Charges are not granted;[44] and

(h) the Proposed Monitor has indicated that it is supportive of the DIP Agreement and the ABL DIP Forbearance Agreement and the financing contemplated therein.[45]

70. In the present case, the DIP facilities provide critical committed financing that will enable the Company to continue to operate during these CCAA proceedings and allow the Company to focus its efforts on its restructuring. The Cash Flow Statement demonstrates that, without financing through the cash flow period, the Company is unable to fund its operations or pursue the SISP or any transaction(s) resulting therefrom.[46]

71. The DIP facilities will also work together with the stay of proceedings to provide the market with confidence that the Company will be able to meet the obligations it incurs during these proceedings. Accordingly, the Company submits that the proposed DIP Agreement, ABL DIP Forbearance Agreement and the DIP Charges should be approved.

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41 Sun Affidavit, para 160(d); Application Record, Tab 2.
42 Sun Affidavit, para 160(e); Application Record, Tab 2.
43 Sun Affidavit, para 158; Application Record, Tab 2.
44 Sun Affidavit, para 157; Application Record, Tab 2.
45 Sun Affidavit, para 160(f); Application Record, Tab 2.
46 Sun Affidavit, para 159; Application Record, Tab 2.

C.5. The Court Should Approve the Administration Charge

72. The Company is seeking a charge on the Property, in priority to all other charges, in the maximum amount of $500,000 (the "**Administration Charge**") to secure the fees and disbursements of the Monitor, counsel to the Monitor, independent counsel to the directors of the Company and counsel to the Company, in each case incurred in connection with services rendered to the Company both before and after the commencement of these CCAA proceedings.

73. The CCAA provides the court with express statutory jurisdiction to grant a priority charge in respect of certain fees and expenses:

> *"**11.52(1) Court may order security or charge to cover certain costs** - 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.*
>
> ***11.52(2) Priority** - The court may order that the security or charge rank in priority over the claim of any secured creditor of the company."*

Companies' Creditors Arrangement Act, supra **at section 11.52; Factum of the Applicant, Schedule B.**

74. In addition to the considerations specifically set out above in section 11.52(1) of the CCAA, courts have looked to the following criteria when deciding whether to approve an administration charge:

(a) the size and complexity of the businesses being restructured;

(b) the proposed role of the beneficiaries of the charge;

(c) whether there is an unwarranted duplication of roles;

(d) whether the quantum of the proposed charge appears to be fair and reasonable;

(e) the position of the secured creditors likely to be affected by the charge; and

(f) the position of the Monitor.

***Re Canwest Publishing, supra* at para 54; Book of Authorities of the Applicant, Tab 13.**

75. In the present matter, the Company submits that the proposed Administration Charge in favour of the proposed beneficiaries is supported by the following factors:

(a) the Company operates 158 stores in 9 different provinces, and purchases inventory from an array of suppliers;[47]

(b) it is important to the success of the Company's restructuring to have the Administration Charge in place to ensure the continued involvement of critical professionals;[48]

(c) there is no anticipated unwarranted duplication of roles;

(d) the Company has worked with the Proposed Monitor and the other professionals to estimate the proposed quantum of the Administration Charge, and in so doing, has taken into account the amounts held by these firms as retainers;[49]

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47 Sun Affidavit, paras 24 and 47; Application Record, Tab 2.

48 Sun Affidavit, para 165; Application Record, Tab 2.

49 Sun Affidavit, para 166; Application Record, Tab 2.

(e) CIBC and GSO have consented to the Administration Charge; and

(f) the Proposed Monitor has advised that it is supportive of the proposed Administration Charge.

76. In view of the foregoing, the Company submits that it is both appropriate and necessary for the court to approve the Administration Charge.

C.6. The Court Should Approve the D&O Indemnity and Charge

77. The Company is seeking an order to: (i) indemnify its directors and officers for obligations and liabilities that they may incur in their capacity as directors or officers of the Company after the commencement of these proceedings, and (ii) create a charge on the Property in the maximum amount of $800,000 (the "**D&O Charge**"), as security for the aforesaid indemnity.

78. The directors have requested, and the Company has agreed (with the support of the ABL Lender and the Term DIP Lenders) to deposit funds in escrow with the Monitor (if so appointed) in amounts sufficient to allow the Company to remit and pay sales tax and to stand as cash collateral for the D&O Charge in respect of certain employment related priority obligations in the event the Company's cash flow from operations and loan facilities are either insufficient or unavailable to remit and pay such amounts. The D&O Charge will have first priority solely with respect to the amounts placed in escrow with the Monitor (if so appointed) and will rank last in respect of all other amounts secured by the D&O Charge.[50]

79. Section 11.51 of the CCAA expressly provides for the granting of a directors' and officers' charge on a priority basis:

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[50] Sun Affidavit, paras 134 and 171; Application Record, Tab 2.

> *"**11.51(1) Security or charge relating to director's indemnification** - 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.*
>
> ***11.51(2) Priority** - The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.*
>
> ***11.51(3) Restriction - indemnification insurance** - 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.*
>
> ***11.51(4) Negligence, misconduct or fault** - 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."*
>
> ***Companies' Creditors Arrangement Act, supra* at section 11.51; Factum of the Applicant, Schedule B.**

80. The Company maintains directors' and officers' liability insurance (the "**D&O Insurance**"). The current D&O Insurance policies include an aggregate amount of $10 million in coverage. However, this coverage is subject to certain retentions, deductibles, exclusions, or some combination of the foregoing, all of which create a degree of uncertainty.[51]

81. Accordingly, the draft Initial Order provides that the directors and officers shall only be entitled to the benefit of the D&O Charge to the extent that they do not have coverage under any directors' and officers' insurance policy, or to the extent that such coverage is insufficient to pay amounts indemnified under the current policy. In *Re Timminco Ltd.* the Ontario Superior Court of Justice adopted a similar approach and approved a limited D&O charge in favour of the directors and officers.

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[51] Sun Affidavit, para 170; Application Record, Tab 2.

***Re Timminco Ltd*, 2012 ONSC 106 [Commercial List] at paras 33-36; Book of Authorities of the Applicant, Tab 17.**

82. In *Re Canwest Global Communications Corp.*, Pepall J. considered the purposes behind section 11.51 of the CCAA and stated:

> *"The purpose of such a charge is to keep the directors and officers in place during the restructuring by providing them with protection against liabilities they could incur during the restructuring: Re General Publishing Co. [(2003), 39 CBR (4th) 216)]. Retaining the current directors and officers of the applicants would avoid destabilization and would assist in the restructuring. The proposed charge would enable the applicants to keep the experienced board of directors supported by experienced senior management. The proposed Monitor believes that the charge is required and is reasonable in the circumstances and also observes that it will not cover all of the directors' and officers' liabilities in the worst case scenario. In all of the circumstances, I approved the request."*

***Re Canwest, supra* at para 48; Book of Authorities of the Applicant, Tab 11.**

83. In the present matter, the Company submits that the D&O Charge should be granted on the following basis:

(a) the directors and officers of the Company have indicated that, due to the risk of personal exposure associated with the Company's liabilities, they will not continue their service with the Company during the post-filing period unless the Initial Order establishes an indemnity in their favour and grants the D&O Charge;[52]

(b) to ensure the ongoing stability of the Company's business during the CCAA period, the Company requires the continued participation of its directors and officers;[53] and

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[52] Sun Affidavit, para 171; Application Record, Tab 2.

[53] Sun Affidavit, para 167; Application Record, Tab 2.

(c) the Proposed Monitor has indicated that it is supportive of the indemnity and D&O Charge and its quantum.[54]

84. The D&O Charge will allow the Company to continue to benefit from the expertise and knowledge of its directors and officers. The Company respectfully submits that the D&O Charge is reasonable in the circumstances.[55]

C.7. The Court Should Approve the KERPs and Grant the KERP Charge

85. The Company seeks an order approving the key employee retention payments ("**KERPs**") that it proposes to offer to certain of its key employees as an incentive for them to remain with the Company through these CCAA proceedings. The Company is proposing KERPs in the aggregate amount of $190,000. The Company is also seeking a charge on the Property to secure the obligations of the Company in respect of the KERPs (the "**KERP Charge**"). The KERP Charge is proposed to rank behind all other charges except the D&O Charge.

86. Employee retention payments are frequently approved in CCAA proceedings where the continued involvement of key employees is deemed to be critical to a successful restructuring. Some of the factors that a Court will consider when determining whether to approve KERPs and a related KERP Charge were set out in *Re Grant Forest Products Inc.*, and include:

(a) whether the Monitor supports the employee retention plan;

(b) whether the key employees who are subject of the employee retention plan are likely to pursue other employment opportunities;

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[54] Sun Affidavit, para 173; Application Record, Tab 2.

[55] *Ibid.*

(c) whether the employees are truly "key employees" whose continued participation in the company is crucial to the restructuring;

(d) whether the quantum of the proposed retention payments is reasonable; and

(e) the business judgment of the board of directors regarding the necessity of the retention payments.

***Re Grant Forest Products Inc* (2009), 57 CBR (5th) 128, (Ont Sup Ct J [Commercial List]) at paras 8-18; Book of Authorities of the Applicant, Tab 18.**

87. The Company submits that the KERPs and KERP Charge should be approved based on the following factors:

(a) the Monitor has advised that it is supportive of the KERPs and the KERP Charge;[56]

(b) absent this Court's approval of the KERPs and the KERP Charge, the key employees may have little incentive to remain with the Company through these CCAA proceedings and are likely to seek other employment opportunities at some point during these proceedings;[57]

(c) the participation of the key employees, which includes the Company's CFO, is critical to the Company's restructuring through these CCAA proceedings.;[58]

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[56] Sun Affidavit, para 176; Application Record, Tab 2.

[57] Sun Affidavit, para 174; Application Record, Tab 2.

[58] Sun Affidavit, para 175; Application Record, Tab 2.

(d) the aggregate maximum amount under the KERPs of $190,000 is reasonable considering the relative experience of the key employees and their familiarity with the Company's assets and overall business;[59] and

(f) the Company's board of directors has determined that the KERPs are necessary and appropriate in the circumstances and the Court should grant considerable deference to their business judgment.[60]

C.8. The Court Should Approve the Appointment of the Monitor

88. The Company is seeking to appoint Richter to act as the Monitor in these CCAA Proceedings.

89. Section 11.7(1) of the CCAA mandates the appointment of a person to monitor the business and financial affairs of the company. The person so appointed must be a trustee, within the meaning of section 2 of the BIA.

> ***Companies' Creditors Arrangement Act, supra* at section 11.7(1); Factum of the Applicant, Schedule B.**

90. The Proposed Monitor has confirmed to the Company that it is qualified and willing to act as Monitor in these proceedings.[61]

91. The Proposed Monitor is an affiliate of the Retail Consultant. The Company does not have a direct or indirect prior business relationship with Richter other than (i) in respect of the Retail Consultant; and (ii) Richter was the monitor in the CCAA proceedings of 247. Having regard to the role of the Retail Consultant and the role of Richter as monitor in 247's CCAA

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[59] Sun Affidavit, para 175; Application Record, Tab 2.

[60] Sun Affidavit, para 176; Application Record, Tab 2.

[61] Sun Affidavit, para 177; Application Record, Tab 2.

proceedings, and given the Retail Consultant's role to date in the Company's preparation for this CCAA filing, I anticipate that there will be a significant amount of overlap between the personnel who have been involved in the Retail Consultant engagement to date, and those who will be involved in carrying out the duties and activities of the Monitor going forward. I believe this is sensible and efficient and in the interest of the Company's stakeholders. The primary secured creditors, CIBC and GSO, are aware of the relationship between the Retail Consultant, the monitor of 247's CCAA proceedings and the Proposed Monitor and have both consented to the appointment of the Proposed Monitor as Monitor in these proceedings.[62]

C.9. Approving the Stalking Horse Agreement & SISP

92. The Company is seeking Court approval of the Stalking Horse Agreement to serve as the minimum bid under the SISP.

93. CCAA courts frequently approve the use of stalking horse agreements in connection with a SISP.

> ***Re PCAS Patient Care Automation Services Inc*, 2012 ONSC 2840 [Commercial List] [*Re PCAS*] at paras 7-8 and 21; Book of Authorities of the Applicant, Tab 19.**
>
> ***Re Brainhunter Inc* (2009), 62 CBR (5th) 41 (Ont Sup Ct J [Commercial List]) [*Re Brainhunter*] at para 21; Book of Authorities of the Applicant, Tab 20.**
>
> ***Re Nortel Networks Corp* (2009), 55 CBR (5th) 229 (Ont. Sup. Ct. J. [Commercial List]) [*Re Nortel Networks Corp.*] at para 49; Book of Authorities of the Applicant, Tab 21.**

94. In *Re PCAS*, Brown J. approved a sale process that included a stalking horse credit bid from the DIP lender and held as follows:

> *"The use of stalking horse bids to set a baseline for the bidding process, including credit bid stalking horses, has been recognized by Canadian courts as a reasonable and useful element of a sales process."*

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[62] Sun Affidavit, para 179; Application Record, Tab 2.

***Re PCAS, supra* at para 7; Book of Authorities of the Applicant, Tab 19.**

95. In *Re Brainhunter*, Morawetz J. (as he then was) approved a stalking horse bid process and held that there is a distinction between the approval of a sale process and the approval of a sale. Section 36 of the CCAA is engaged when determining whether to approve a sale, whereas the factors set out in *Re Nortel Networks Corp.* are engaged when considering whether to approve a sales process. The factors identified in *Re Nortel Networks Corp.*, are as follows:

(a) is a sale transaction warranted at this time?

(b) will the sale benefit the whole "economic community"?

(c) do any of the debtors' creditors have a *bona fide* reason to object to a sale of the business?

(d) is there a better viable alternative?

***Re Brainhunter, supra* at paras 13-17; Book of Authorities of the Applicant, Tab 20.**

***Re Nortel Networks Corp., supra* at para 49; Book of Authorities of the Applicant, Tab 21.**

96. Having regard to the *Nortel* factors, the SISP should be approved by this Court on the following basis:

(a) the proposed SISP is warranted at this time as it will provide a means for testing the market, gauging interest in the Company and its assets and determining whether a transaction is available that is more advantageous than the Stalking Horse Agreement. The Company, in consultation with the Retail Consultant, has explored its strategic alternatives and the Company has determined that it is in the best interests of the Company and its stakeholders to enter into the Stalking Horse

Agreement and to pursue the SISP. In addition, this Court will retain its jurisdiction to approve any proposed sale to any successful bidder under section 36 of the CCAA;[63]

(b) the SISP provides an opportunity to sell the business of the Company as a going concern for the benefit of the entire "economic community" including creditors, employees and suppliers. The Stalking Horse Agreement will provide the Company's stakeholders with assurance that the business conducted by the Company will continue as a going-concern. The SISP was designed in the hopes of attracting offers for the Company's business and/or assets that is superior to the offer contemplated in the Stalking Horse Agreement;[64]

(c) the Company is not aware of any objections to the SISP or the Stalking Horse Agreement. Both CIBC and GSO, the Company's primary secured creditors, are supportive of the Stalking Horse Agreement and SISP. Moreover, the effects of the proposed sale on the Company's creditors and other interested parties can be more fully considered on a sale approval motion;[65] and

(d) the Company's board of directors has determined that the SISP and the Stalking Horse Agreement are in the best interests of the Corporation.

97. The Monitor, CIBC and GSO are supportive of the SISP and the Stalking Horse Agreement.[66] In *Re Ivaco*, Cumming J. held that:

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63 Sun Affidavit, paras 122 and 150; Application Record, Tab 2.

64 Sun Affidavit, paras 91 to 97; Application Record, Tab 2

65 Sun Affidavit, para 152; Application Record, Tab 2.

66 *Ibid.*

> *"[a]bsent some compelling, exceptional factor to the contrary (not seen here), in my view, the Court should accept an applicant's proposed sales process under the CCAA, when it has been recommended by the Monitor and is supported by the disinterested major creditors."*
>
> ***Re Ivaco Inc* (2004), 3 CBR (5th) 33 (Ont Sup Ct J [Commercial List]) at para 21; Book of Authorities of the Applicant, Tab 22.**

98. For the reasons set out above, the Company submits that this Court should approve the Stalking Horse Agreement and the SISP.

C.10. Approving the Liquidation Consulting Agreement

99. In conjunction with the proposed restructuring transaction to be carried out through the SISP, the Company entered into a liquidation consulting agreement with a contractual joint venture composed of Gordon Brothers Canada ULC and Merchant Retail Solutions ULC (together, the "**Liquidation Consultant**") dated January 24, 2017 (the "**Liquidation Consulting Agreement**") pursuant to which the Company proposes to engage the Liquidation Consultant as its exclusive consultant to advise the Company with respect to the liquidation of certain stores. The Company is to provide an initial list of stores to be liquidated (the "**Closing Stores**") to the Liquidation Consultant no later than February 2, 2017, and the Company may then add or remove stores from the list of Closing Stores until March 15, 2017.[67]

100. It is the Company's intention, with the assistance of the Lease Consultant, to attempt to negotiate rent concessions between the filing date and March 15, 2017 in order to determine if any of the underperforming stores can be continued. Absent rent concessions, the Company would designate such underperforming stores as Closing Stores.[68]

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[67] Sun Affidavit, para 99; Application Record, Tab 2.

[68] *Ibid.*

101. Prior to seeking protection under the CCAA, the Company, with the assistance of the Retail Consultant and the Lease Consultant, conducted an analysis of the performance of each of its retail store locations. As a result of this analysis the Company, in consultation with the Retail Consultant, has determined that it is in the best interests of the Company's stakeholders to liquidate the inventory and owned FF&E at a number of the poorest performing stores (which the Stalking Horse Purchaser has indicated it will not assume on existing lease terms).[69]

102. The Liquidation Consulting Agreement permits the Company to, among other things, increase or decrease the number of stores involved in the liquidation process at any time up to March 15, 2017. Accordingly, if during the Sale Term the Company, with the assistance of the Lease Consultant (subject to obtaining Court approval of the Second Lease Consulting Agreement), is able to renegotiate lease terms in respect of certain stores such that the store becomes desirable to the Stalking Horse Purchaser or another bidder under the SISP, as applicable, such store can be removed from the liquidation process and kept open following completion of a sale or other transaction entered into pursuant to the SISP.[70]

103. The Court has jurisdiction to authorize a disposition of assets outside of the ordinary course of business under section 36 of the CCAA:

> *"**36(1) Restriction on disposition of business assets** - A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.*

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69 Sun Affidavit, para 98; Application Record, Tab 2.

70 Sun Affidavit, para 104; Application Record, Tab 2.

> ***36(2) Notice to creditors*** *- A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.*
>
> ***36(3) Factors to be considered*** *- In deciding whether to grant the authorization, the court is to consider, among other things,*
>
> *a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;*
>
> *(b) whether the monitor approved the process leading to the proposed sale or disposition;*
>
> *(c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;*
>
> *(d) the extent to which the creditors were consulted;*
>
> *(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and*
>
> *(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.*
>
> [...]
>
> ***36(6) Assets may be disposed of free and clear*** *- The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.*
>
> ***36(7) Restriction - employers*** *- The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(4)(a) [sic] and (5)(a) [sic] if the court had sanctioned the compromise or arrangement."*

Companies' Creditors Arrangement Act, supra **at section 36; Factum of the Applicant, Schedule B.**

104. Section 36 of the CCAA permits a liquidation sale of a debtor's assets to downsize the debtor company's business. In *Re Target*, Morawetz R.S.J. held that as follows:

> *"The 2009 amendments did not expressly address whether the CCAA could be used generally to wind-down the business of a debtor company. However, I am satisfied that the enactment of section 36 of the CCAA, which establishes a process for a debtor company to sell assets outside the ordinary course of business while under CCAA protection, is consistent*

with the principle that the CCAA can be a vehicle to downsize or wind-down a debtor company's business"

***Re Target, supra* at para 33; Book of Authorities of the Applicant, Tab 3.**

***Re Fairmont Resort Properties Ltd*, 2012 ABQB 39, (2012) 532 AR 209, at paras 26-31; Book of Authorities of the Applicant, Tab 23.**

105. CCAA courts have held that the criteria in section 36(3) overlap with the criteria set forth in *Royal Bank v. Soundair Corp.*, which include:

(a) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;

(b) the interests of all parties;

(c) the efficacy and integrity of the process by which offers have been obtained; and

(d) whether there has been unfairness in the working out of the process.

***Re Canwest Publishing Inc/Publications Canwest Inc*, 2010 ONSC 2870, (2010) 68 CBR (5th) 233 [Commercial List] at para 13; Book of Authorities of the Applicant, Tab 24.**

***Royal Bank of Canada v Soundair* Corp, [1991] OJ No 1137 (ONCA) at para 16; Book of Authorities of the Applicant, Tab 25.**

106. In the present matter, the proposed liquidation of the Closing Stores pursuant to the Liquidation Consulting Agreement satisfies the section 36 CCAA criteria, as well as the *Soundair* principles on the following basis:

(a) the Liquidation Consulting Agreement was the culmination of a bidding process undertaken by the Company, in consultation with the Retail Consultant, to broadly canvass the market for potential liquidation proposals for the sale of Merchandise and FF&E at the Closing Stores. The Company marketed the liquidation consulting opportunity to approximately 6 firms that provide

liquidation consultant services. The Company received four bids and selected the Liquidation Consultant as the successful bidder. A number of the liquidation proposals received, including that from the Liquidation Consultant, contained financial terms that were within a narrow competitive range. The Liquidation Consultant's bid was selected because the Company was of the view that the level of services, including supervisory and advertising support, as reflected in the proposed budget and through discussions with the Liquidation Consultant, were the most attractive;[71]

(b) the determination to engage a liquidation consultant for the purpose of liquidating the Closing Stores was initiated prior to the commencement of these CCAA proceedings following the Retail Consultant's preliminary review of the Company's present and projected financial performance. Following its internal review, the Company discussed the various strategic alternatives identified with the Retail Consultant with CIBC and GSO. Based upon those discussions, GSO made a non-binding restructuring proposal to the Company to implement a sale and investment process involving a going concern "stalking horse credit bid" to be completed through an insolvency proceeding. The Company determined, with the assistance of the Retail Consultant, that negotiating such a transaction was the best course of action to maximize value for its stakeholders, culminating in the Stalking Horse Agreement and proposed SISP to be undertaken in restructuring proceedings under the CCAA, coupled with the liquidation of assets located at

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[71] Sun Affidavit, para 101; Application Record, Tab 2.

underperforming store locations pursuant to and in accordance with the Liquidation Consulting Agreement;[72]

(c) CIBC and GSO, the Company's primary secured creditors, were each consulted prior to the execution of the Liquidation Consulting Agreement and are supportive of the Company's request for court approval of the Liquidation Consulting Agreement;[73]

(d) the Proposed Monitor is also supportive of the Liquidation Consulting Agreement;[74] and

(e) the Company expects that the liquidation of the Closing Stores pursuant to the Liquidation Consulting Agreement, to be undertaken in conjunction with the SISP, will result in the highest possible recovery for the Company and its stakeholders.[75]

107. In addition to the factors set out above, section 36(7) of the CCAA requires that the Court be satisfied that the Company can and will make payments on account of unpaid wages for services rendered in the six months preceding the Initial Order (up to a maximum amount of $2,000 or $1,000 for a travelling salesperson) and certain amounts that may be owing under a pension plan.

108. It is contemplated (and reflected in the Cash Flow Statement) that amounts for which employees have a claim under subsections 81.4 and 81.5 of the *Bankruptcy and*

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72 Sun Affidavit, para 87; Application Record, Tab 2.

73 Sun Affidavit, para 107; Application Record, Tab 2.

74 *Ibid.*

75 Sun Affidavit, para 151; Application Record, Tab 2.

Insolvency Act (Canada) will be paid. The Company does not maintain a pension plan for its employees.[76]

PART V - RELIEF REQUESTED

109. The Company therefore requests that this Application be granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 25th day of January, 2017

Stuart Brotman

Dylan Chochla

Lawyers for the Applicant, Grafton-Fraser Inc.

[76] Sun Affidavit, paras 43 and 44; Application Record, Tab 2.

SCHEDULE "A"

SCHEDULE "A"

1. *Re Stelco Inc* (2004), 48 CBR (4th) 299 (Ont Sup Ct J [Commercial List]); leave to appeal to CA ref'd, [2004] OJ No 1903; leave to appeal to SCC ref'd [2004] SCCA No 336.

2 *Century Services Inc v Canada (Attorney General)*, 2010 SCC 60, [2010] 3 SCR 379.

3 *Re Target Canada Co*, 2015 ONSC 303, 22 CBR (6th) 323 [Commercial List].

4 *Re Anvil Range Mining Corp* (2002), 34 CBR (4th) 157 (ONCA).

5 *Re First Leaside Wealth Management Inc*, 2012 ONSC 1299, 213 ACWS (3d) 266 [Commercial List].

6 *Re Lehndorff General Partner Ltd* (1993), 17 CBR (3d) 24 (Ont Sup Ct J [Commercial List]).

7 Lloyd W Houlden, Geoffrey B Morawetz & Janis P Sarra, *The 2015-2016 Annotated Bankruptcy and Insolvency Act*, (Toronto: Carswell, 2014).

8 *Toronto Stock Exchange Inc v United Keno Hill Mines Ltd* (2000), 19 CBR (4th) 299 (Ont Sup Ct J [Commercial List]).

9 *Re Northland Properties Ltd* (1988), 73 CBR (NS) 141 (BCSC).

10 *Re Canwest Global Communications Corp* (2009), 61 CBR (5th) 200 (Ont Sup Ct J [Commercial List]).

11 *Re Canwest Global Communications Corp* (2009), 59 CBR (5th) 72 (Ont Sup Ct J [Commercial List]).

12 *Re Northstar Aerospace Inc*, 2012 ONSC 4546, (2012), 222 ACWS (3d) 587 [Commercial List].

13 *Re Canwest Publishing Inc*, 2010 ONSC 222, [2010] OJ No 188 [Commercial List].

14 *Re Cinram International Inc*, 2012 ONSC 3767, (2012) 91 CBR (5th) 46 [Commercial List].

15 *Re Performance Sports Group Ltd*, 2016 ONSC 6800 [Commercial List].

16 *Re Comark Inc*, 2015 ONSC 2010 [unreported] [Commercial List].

17 *Re Timminco Ltd*, 2012 ONSC 106 [Commercial List].

18 *Re Grant Forest Products Inc* (2009), 57 CBR (5th) 128, (Ont Sup Ct J [Commercial List])

19 *Re PCAS Patient Care Automation Services Inc*, 2012 ONSC 2840 [Commercial List].

20 *Re Brainhunter Inc* (2009), 62 CBR (5th) 41 (Ont Sup Ct J [Commercial List]).

21 *Re Nortel Networks Corp* (2009), 55 CBR (5th) 229 (Ont Sup Ct J [Commercial List]).

22 *Re Ivaco Inc* (2004), 3 CBR (5th) 33 (Ont Sup Ct J [Commercial List]).

23 *Re Fairmont Resort Properties Ltd*, 2012 ABQB 39, (2012) 532 AR 209.

24 *Re Canwest Publishing Inc/ Publications Canwest Inc*, 2010 ONSC 2870, (2010) 68 CBR (5th) 233 [Commercial List].

25 *Royal Bank of Canada v Soundair Corp*, [1991] OJ No. 1137 (ONCA).

SCHEDULE "B"

SCHEDULE "B"

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

2 Definitions

"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;

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

2(1) Interpretation

"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, railway or telegraph companies, insurance companies and companies to which the Trust and Loan Companies Act applies;

"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;

[...]

9(1) Jurisdiction of court to receive applications

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.

[...]

11.02(1) - Stays, etc. - initial application

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 30 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.

[...]

11.03(1) - Stays - directors

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

[...]

11.2(1) Interim financing

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.

11.2(2) Priority - secured creditors

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

11.2(3) Priority - other orders

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.

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.

[...]

11.4(1) Critical supplier

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.

(2) Obligation to supply

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.

(3) Security or charge in favour of critical supplier

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.

(4) Priority

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

[...]

11.7(1) Court to appoint monitor

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

(2) Restrictions on who may be monitor

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).

[...]

11.51(1) Security or charge relating to director's indemnification

On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the

property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

(2) Priority

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

(3) Restriction - indemnification insurance

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

(4) Negligence, misconduct or fault

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.

11.52(1) Court may order security or charge to cover certain costs

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

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

(2) Priority

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

[...]

36(1) Restriction on disposition of business assets

A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

(2) Notice to creditors

A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

(3) Factors to be considered

In deciding whether to grant the authorization, the court is to consider, among other things,

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the monitor approved the process leading to the proposed sale or disposition;

(c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

(4) Additional factors — related persons

If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that

(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and

(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

(5) Related persons

For the purpose of subsection (4), a person who is related to the company includes

(a) a director or officer of the company;

(b) a person who has or has had, directly or indirectly, control in fact of the company; and

(c) a person who is related to a person described in paragraph (a) or (b).

(6) Assets may be disposed of free and clear

The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

(7) Restriction — employers

The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(4)(a) and (5)(a) if the court had sanctioned the compromise or arrangement.

Court File No.

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 GRAFTON-FRASER INC.

(the "Applicant")

ONTARIO
SUPERIOR COURT OF JUSTICE
[COMMERCIAL LIST]

Proceedings commenced in Toronto

FACTUM OF THE APPLICANT

(Initial Application returnable January 25, 2017)
(Motion for Approval of Stalking Horse Agreement, SISP & Liquidation Consulting Agreement returnable January 30, 2017)

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