Estate/Court File No. 32-2403547

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL UNDER THE *BANKRUPTCY AND INSOLVENCY ACT,* R.S.C. 1985, c. B-3, AS AMENDED OF

IMPOPHARMA INC.

Applicant

FACTUM OF THE APPLICANT
(Returnable August 2, 2018)

July 30, 2018

STIKEMAN ELLIOTT LLP
Barristers & Solicitors
5300 Commerce Court West
199 Bay Street
Toronto, Canada M5L 1B9

Guy Martel
Tel: (514) 397-3163
Email: gmartel@stikeman.com

Kathryn Esaw LSUC#58264F
Tel: (416) 869-6820
Fax: (416) 947-0866
Email: kesaw@stikeman.com

Lawyers for the Applicant

Estate/Court File No. 32-2403547

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL UNDER THE *BANKRUPTCY AND INSOLVENCY ACT,* R.S.C. 1985, c. B-3, AS AMENDED OF

IMPOPHARMA INC.

Applicant

FACTUM OF THE APPLICANT
(Returnable August 2, 2018)

PART I - OVERVIEW

1. This Application is made by Impopharma Inc. ("**Impopharma**"), for an order pursuant to subsections 50.4(9), 64.1, 64.2 and 183 of the *Bankruptcy and Insolvency Act* (Canada) ("**BIA**"):

(a) abridging the time for delivery of its Notice of Application and the Application Record, if necessary;

(b) extending the stay of proceedings resulting from the filing by Impopharma of the Notice of Intention to Make a Proposal (the "**NOI**") until September 30, 2018;

(c) approving the execution of a Forbearance Agreement entered into on July 25, 2018 (the "**Forbearance Agreement**") between Impopharma, Impopharma US, Inc. ("**Impopharma US**") and MidCap Financial Trust ("**MidCap**");

(d) approving the court-supervised sale investment solicitation process (the "**SISP**") set out in the affidavit of Theron E. Odlaug, dated July 26, 2018;

(e) granting a first priority charge on all of Impopharma's assets, property and undertaking (the "**Property**") in the amount of $100,000, in favour of Richter Advisory Group Inc., in its capacity as proposal trustee ("**Richter**" or the "**Trustee**"), counsel to the Trustee and counsel to Impopharma (the "**Administration Charge**");

(f) granting a second priority charge on the Property in the amount of $75,000, in favour of the directors and officers of Impopharma (the "**D&O Charge**"); and

(g) approving Impopharma's Key Employee Retention Plan (the "**KERP**") and granting a third priority charge on the Property in the amount of $550,000, in favour of the key employees of Impopharma (the "**KERP Charge**"); and

(h) sealing Impopharma's financial statements and the summary table setting forth the identity of the beneficiaries of the Retention Contracts and the amounts payable to them.

PART II - FACTS

2. The facts relevant to this Application are set out in detail in the affidavit of Theron E. Odlaug, dated July 26, 2018 (the "**Odlaug Affidavit**"). Below is a brief summary of those facts.

General

3. Founded in 1996 by Hanna Piskorz and Harold Wulffhart, Impopharma is a company based in Concord, Ontario, which operates as a research and development pharmaceutical company that develops nasal and pulmonary products.

Odlaug Affidavit, at para. 17.

4. Over the past 20 years, Impopharma has grown its operations which were initially conducted from a 150 square feet single office, to now being conducted in a 15,000 square feet facility in Concord, Ontario, comprised of a laboratory, a small pilot manufacturing, document storage, sample storage and office spaces that staffs all of its employees.

Odlaug Affidavit, at para. 18.

5. Over the years, Impopharma has acted as an extension of its client's laboratory, including Top 20 global Rx pharma companies, and has equipped itself with highly specialized equipment, key scientists as well as expertise in many product development strategies in line with current regulatory expectations.

Odlaug Affidavit, at para. 18.

6. Today, as part of its product offering, Impopharma offers dry powder inhalers, metered nasal sprays, metered sublingual sprays, injectable products, ophthalmic products, and oral products. It also provides topical products that include creams, gels, solutions, and suspensions, as well as otic products. In addition to such products, Impopharma also offers various services that include testing of branded products, formulation development of generic and innovative products, product development, method development and validation, stability studies, characterization studies, in-vitro bioequivalence studies, production process development and scale-up manufacturing, production of stability/clinical batches, clinical trial management support, technology transfer, regulatory support for FDA, TPD, EMEA, and MCA submissions, and delivery device design and development, including blinding devices.

Odlaug Affidavit, at para. 19.

7. On July 25, 2018, Impopharma filed an NOI pursuant to section 50.4 of the BIA, and appointed Richter as its NOI trustee.

Odlaug Affidavit, at para. 4.

8. The filing of the NOI was made in a context where on or about July 12, 2018, Impopharma and its US affiliate, Impopharma US received from MidCap, in its capacity as administrative agent for MidCap Funding XIII Trust under a Credit and Security Agreement dated July 8, 2016 (the "**Credit Agreement**"), a Notice of default (the "**Notice of Default**") advising that, *inter alia*, a formal demand was made by MidCap for the payment of all amounts due and owing pursuant to the Credit Agreement, including the principal monies with interest, and all other amounts owing pursuant thereto.

Odlaug Affidavit, at para. 5.

9. Attached to the Notice of Default were Notices of Intention to Enforce Security issued by MidCap to each of Impopharma and Impopharma US pursuant to Section 244 of the BIA (collectively, the "**244 Notices**"), advising that MidCap, in its capacity as administrative agent under the Credit Agreement, intended to enforce its security against substantially all of Impopharma's and Impopharma US' present and after-acquired personal property.

Odlaug Affidavit, at para. 6.

10. Following the issuance of the Notice of Default and the 244 Notices, Impopharma, together with its legal and financial advisors, initiated without prejudice discussions with MidCap and its counsel, in order to discuss a potential action plan (the "**Action Plan**") which would potentially allow the maximization of Impopharma's assets, for the benefit of its creditors and other stakeholders.

Odlaug Affidavit, at para. 7.

11. Pursuant to the Action Plan, Impopharma would initiate, with the assistance of the Trustee, a SISP with a view of selling its assets under the supervision of this Court.

Odlaug Affidavit, at para. 8.

12. On July 20, 2018, Impopharma and Midcap reached an agreement on the Action Plan, including on the terms and conditions of the SISP.

Odlaug Affidavit, at para. 9.

13. Accordingly, on July 25, 2018, after discussions and negotiations, Impopharma and MidCap executed a Forbearance Agreement (i.e. the Forbearance Agreement) pursuant to which the latter agreed, subject to the terms and conditions set forth therein, to forbear from enforcing its rights as secured creditor against Impopharma, and to support the conduct of the SISP in the context of these proceedings.

Odlaug Affidavit, at para. 10.

Impopharma's Financial Situation

14. Over the past few years, several factors have materially contributed to the deterioration Impopharma's financial situation, and have rendered its economic environment very challenging.

Odlaug Affidavit, at para. 43.

15. For instance, in the past year, Impopharma's revenues have decreased due to a variety of factors, including, *inter alia*, various changes in the competitive landscape, combined with delays incurred in connection with certain projects in which Impopharma was involved in.

Odlaug Affidavit, at para. 44.

16. Despite various cost-cutting measures implemented, Impopharma has been unable to find its way back to profitability.

Odlaug Affidavit, at para. 45.

17. For the fiscal years ended December 31, 2016, and December 31, 2017, Impopharma recorded a total comprehensive net loss of approximately US$7.251 million and US$5.608 million, respectively.

Odlaug Affidavit, at para. 46.

18. Moreover, as at June 30, 2018, Impopharma had assets with an estimated book value of $2.566 million, in comparison with an indebtedness in the aggregate of $4.009 million (after a US$1,775,000 payment to MidCap on July 25, 2018, in accordance with the Forbearance Agreement).

Odlaug Affidavit, at paras. 27-28.

19. As of the date hereof, Impopharma is no longer able to continue its operations and to meet its obligations in the ordinary course of business, and, as such, has become insolvent.

Odlaug Affidavit, at para. 47.

The SISP

20. In order to maximize the value of its assets, Impopharma, with the assistance of the Trustee, intends to conduct the SISP and achieve the following milestones:

Steps	Milestones	Indicative Timeframe (# of weeks from the approval of the SISP by the Court)
1.	Preparation of solicitation materials (teaser/confidential information memorandum)	1-2
2.	Population of a data room with supporting data covering substantially all of Impopharma's assets	1-2
3.	Market opportunities to interested parties and execute non-disclosure agreements with prospective purchasers / investors	1-2
4.	Evaluation of opportunity by prospective purchasers / investors	1-6
5.	Receipt of binding Letters of Intent ("**LOIs**")	By August 30, 2018
6.	Consideration of LOIs and selection of one or more purchasers / investors to proceed with	7-8
7.	Execution of Definitive Agreement (closing to be subject only to applicable court approval and regulatory approvals; i.e. no diligence or financing conditions)	By September 15, 2018
8.	Court Approval	9-10
9.	Regulatory approval – will depend on structure of transaction(s) and identity of purchaser(s) / investor(s)	9-10
10.	Closing and post-closing matters	By September 30, 2018

Odlaug Affidavit, at para. 50.

21. The SISP described above, whose purpose is to maximize the value of Impopharma's assets and ensure creditor recovery, is the result of discussions between Impopharma, its advisors, the Trustee and MidCap.

Odlaug Affidavit, at para. 52.

22. The SISP will provide a means for testing the market, gauging interest in Impopharma and/or its assets and determining whether a transaction is available that is advantageous to Impopharma and its stakeholders in comparison to a bankruptcy liquidation or sale by a receiver.

Odlaug Affidavit, at para. 54.

23. Given the nature of its assets and its limited amount of liquidities, Impopharma believes and submits that the proposed SISP is reasonable in the circumstances, and should therefore be approved by this Court.

Odlaug Affidavit, at para. 55.

24. Impopharma understands that both the Trustee and MidCap are supportive of the SISP, as well as the proposed milestones described above.

Odlaug Affidavit, at para. 56.

PART III - ISSUES

25. The following issues are to be resolved in this Application:

A. Should this Court approve the Forbearance Agreement

B. Should this Court approve the SISP?

C. Should this Court approve the Administration Charge (as defined below)?

D. Should this Court approve the D&O Charge (as defined below)?

E. Should this Court approve the KERP and the KERP Charge (as defined below)?

F. Should this Court order the sealing of the Confidential Exhibits (as defined below)?

G. Should this Court extend the stay of proceedings resulting from the filing of the NOI to September 30, 2018?

PART IV – ARGUMENT

A. This Court Should Approve the Forbearance Agreement

26. The Forbearance Agreement is the result of various discussions and negotiations between Impopharma and its principal secured creditor, MidCap.

27. As part of these discussions, MidCap has clearly indicated to Impopharma that unless such Forbearance Agreement was agreed upon, MidCap would have no other choice but to enforce its rights, as previously indicated in the Notice of Default and the 244 Notices.

28. In these circumstances, Impopharma submits that this Court should approve the Forbearance Agreement, as it will allow these proceedings to continue, and initiate the SISP, for the benefit of all creditors and staheholders.

B. This Court Should Approve the SISP

29. With regards to the SISP, although Section 65.1 of the BIA requires the approval of this Court for the sale of an insolvent person's assets outside of the ordinary course of business in the context of an NOI, there is no statutory obligation to obtain court approval of a sale process. Nonetheless, in order to be as transparent as possible, Impopharma seeks the approval of the SISP to ensure that this Court, as well as its creditors and stakeholders, are made aware of the proposed SISP at an early stage so that the path going forward is made clear to all interested or potentially interested parties.

30. It is now widely recognized that the remedial nature of insolvency legislation in Canada allows an insolvent debtor to seek the protection of the Court so as to allow it to proceed with the orderly sale of its assets in a manner which maximizes their value for the benefit of its creditors and other stakeholders.

31. In fact, even before the Canadian insolvency legislation (the BIA and the *Companies' Creditors Arrangement Act* (the "**CCAA**")) was amended in 2009 so as to include, *inter alia*, sections which allowed an insolvent debtor to sell its assets outside of its ordinary course of business (i.e. section 65.1 of the BIA and section 36 of the CCAA), Courts across Canada had recognized, on a number of occasions, an insolvent debtor's right to seek creditor protection in

order to proceed with the sale of its assets, with a view of maximizing their value for the benefit of its creditors and stakeholders. In doing so, Courts relied on their inherent jurisdiction under the insolvency legislation.

32. In *Lehndorff General Partner Ltd. (Re)*, Justice Farley expressly recognized that one of the purposes of insolvency legislation (in this case, the CCAA) is to facilitate the ongoing operations of a business where its assets have greater value as part of an integrated system than individually. In doing so, he stated the following:

> *"One of the purposes of the CCAA is to facilitate ongoing operations of a business where its assets have a greater value as part of an integrated system than individually.*
>
> *[...]*
>
> *It appears to me that the purpose of the CCAA is also to protect the interests of creditors and to enable an orderly distribution of the debtor company's affairs. This may involve a winding-up or liquidation of a company or simply a substantial downsizing of its business operations, provided the same is proposed in the best interests of the creditors generally."*
>
> [Emphasis added]
>
> *Lehndorff General Partner Ltd. (Re)*, [1993] O.J. No. 14, at p. 4-5 [Book of Authorities, **TAB 1**]

33. Similarly, in the matter of *Re Olympia & York Developments Ltd.*, Justice Farley reiterated the broad remedial purpose of insolvency legislation (in this case, the CCAA) and stated the following:

> *"The CCAA need not be employed to revitalize a corporation but can also involve a liquidation scenario."*
>
> *Re Olympia & York Developments Ltd.* (1995), 3 C.B.R. (3d) 93 (Ont. Gen Div.), at para. 18 [Book of Authorities, **TAB 2**]

34. Although the previous decisions were rendered under the aegis of the CCAA, it is also widely recognized that the provisions of the BIA have been clearly aligned with those of the CCAA. In fact, Courts have often stated that the powers granted in either of these statutes could be imported into the other statute, by virtue of the inherent powers of the Court, the objectives of both statutes being substantially the same.

> *"[43] Le législateur, a de façon évidente, arrimé les dispositions de la LFI à celles de la Loi* [la LACC], *et les tribunaux canadiens ont consacré à plusieurs reprises le fait que certains pouvoirs présents dans l'une de ces lois pouvaient être importés dans l'autre Loi, et ce en vertu des pouvoirs inhérents du Tribunal, les objectifs de ces deux (2) lois étant sensiblement les mêmes."*
>
> *UNOFFICIAL TRANSLATION*
>
> *"[43] The legislator, obviously, has anchored the provisions of the BIA to the provisions of the Act [CCAA], and Canadian courts have repeatedly held that some of the powers that are granted in one of these acts may be imported into the other, by virtue of the inherent powers of the Tribunal, as the objectives of these two (2) acts are substantially the same."*
>
> *Développement Lachine Est Inc (Re)*, Court File No. 500-11-051881-171, as per Castonguay J., February 2, 2017, at para. 43 [Book of Authorities, **TAB 3**]

35. Recently, Justice Penny of the Ontario Superior Court of Justice made similar comments about the BIA's remedial nature and the Court's power to grant such orders as a way to maximize creditors' recovery.

> *"[39] A sale process which allows Danier to be sold as a going concern would likely be more beneficial than a sale under a bankruptcy, which does not allow for the going concern option."*
>
> *Danier Leather Inc. (Re)*, 2016 ONSC 1044, at para. 39 [Book of Authorities, **TAB 4**]

36. According to Professor Janis Sarra, the liquidation of a debtor's assets under the protection of the Court (whether it be pursuant to the BIA or the CCAA) can be qualified as a "*restructuring of a different color*".

> *"As liquidating CCAA proceedings have gained in popularity, the prevailing view appears to be that a going-concern sale of a company in CCAA is not a traditional liquidation but is instead a restructuring of a different colour. As stated in Re Consumers Packaging Inc, "[t]he sale of [a debtor's] operation as a going concern ... allows the preservation of [the debtor's] business (albeit under new ownership), and is therefore consistent with the purpose of the CCAA."*
>
> Janis P. Sarra, "Having Jumped Off the Cliffs, When Liquidating Why Choose CCAA over Receivership (or vice versa)?" (2013) Annual Review of Insolvency Law, at 4 [Book of Authorities, **TAB 5**]

37. In fact, over the last few years, several insolvent companies have sought creditor protection under the BIA in order to initiate a sale process in respect of their assets. Some of the recent examples include the BIA proceedings initiated in Quebec by companies such as Boutique Jacob, Bikini Village, Mexx Canada and BCBG Max Azria.

38. In the case at hand, the proposed SISP and related milestones described above are the result of extensive discussions between Impopharma, its advisors and the Trustee, and the purpose of such SISP was and remains to find a way to maximize the value of its Assets under the present circumstances.

39. Given the nature of Impopharma's assets and its limited amount of liquidities, the conduct of the SISP in the context of these proceedings constitutes the best option for the realization of those assets and the maximization of their value for the benefit of its stakeholders, including its creditors.

40. It is believed that in the event of a liquidation under a bankruptcy scenario where all operations would be terminated, the value of the Assets would be substantially reduced. It is expected that the SISP in the context of the present proceedings will yield better results than any conceivable "*go-dark*" scenario.

41. Impopharma understands that both the Trustee and MidCap are supportive of the SISP, as well as the proposed milestones described above.

42. Obviously, this Court will retain its jurisdiction to approve any proposed sale under Section 65.13 of the BIA.

C. This Court Should Approve the Administration Charge

43. As part of its Application, Impopharma seeks a charge and security over all of its assets, namely the Administration Charge, in priority to all other charges in the maximum and aggregate amount of $100,000, to secure the payment of the fees and disbursements of the Trustee, legal counsel of the Trustee and of its own legal counsels incurred in the relation with these BIA proceedings.

44. In any restructuring proceedings, whether it involves the actual restructuring of the debtor company or the sale of its assets, the granting of administration charges has not only become customary, but also a pre-requisite to the restructuring itself given the debtor company's need for assistance from insolvency professionals in the context of these proceedings.

45. Indeed, administrative charges are consistently approved in insolvency proceedings under the BIA, where, as is the case herein, the involvement of certain professionals is necessary to ensure the success of a particular arrangement.

> *Colossus Minerals Inc. (Re)*, 2014 ONSC 514, paras. 11 to 15 [Book of Authorities, **TAB 6**]

46. Section 64.2 of the BIA provides statutory jurisdiction to grant such a charge:

> ***64.2 (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 person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) 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 trustee, including the fees and expenses of any financial, legal or other experts engaged by the trustee in the performance of the trustee's duties;*
>
> *(b) any financial, legal or other experts engaged by the person for the purpose of proceedings under this Division; 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 the effective participation of that person in proceedings under this Division.*
>
> ***64.2 (2) Priority*** *- The court may order that the security or charge rank in priority over the claim of any secured creditor of the person.*

47. In determining whether the quantum of the administration charge is reasonable under the circumstances, several factors have been identified by the Court, including those listed below:

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

(f) the position of the Monitor or the Trustee to the NOI.

Canwest Publishing Inc., 2010 ONSC 222, para. 54 [Book of Authorities, **TAB 7**]

48. In the case at hand, the following factors support the granting of the Administration Charge as requested:

(a) the beneficiaries of the Administration Charge sought have discussed with Impopharma the work which is anticipated to be required in order to maximize the chances of having a successful SISP;

(b) such beneficiaries will provide essential legal and financial advice throughout these proceedings and throughout the SISP;

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

(d) the Trustee supports the Administration Charge and its proposed quantum and believes it to be fair and reasonable in view of the anticipated duration and complexity of these proceedings and the services to be provided by the beneficiaries of the Administration Charge.

49. In addition, Impopharma understands that MidCap is supportive of the Administration Charge.

50. Accordingly, Impopharma respectfully submits that it is critical to the success of the SISP to have the Administration Charge in place to ensure that the beneficiaries thereof are protected with respect to their fees and disbursements. Each of the proposed beneficiaries to the Administration Charge have and will continue to play a critical role in the SISP and the current BIA proceedings. Impopharma further submits that the Administration Charge sought is reasonable in the circumstances.

D. This Court Should Approve the D&O Charge

51. To ensure the ongoing stability of Impopharma during these proceedings and to maximize the potential of a successful SISP, Impopharma requires the active and committed involvement and continued participation of its directors and officers (the "**D&Os**"), who manage the business, commercial activities and internal affairs of Impopharma and who have specialized

expertise and relationships with Impopharma's suppliers, employees and other stakeholders that cannot be replicated or replaced.

52. In light of Impopharma's insolvency, the D&Os are mindful of the risks associated with acting in such capacity during these proceedings. As such, the D&O Charge in the amount of $75,000 over all of Impopharma's Assets in favour of the D&Os is hereby sought in order to protect the D&Os from certain potential liability which they may incur *from and after* the commencement of these proceedings by reason of or in relation to their capacity as directors and/or officers of Impopharma.

53. The BIA has codified the granting of directors' charges on a priority basis in section 64.1 of the BIA, which provides as follows:

> ***64.1(1) Security or charge relating to director's indemnification*** - *On application by a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) 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 property of the person is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the person to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer after the filing of the notice of intention or the proposal, as the case may be.*
>
> ***64.1(2) Priority*** - *The court may order that the security or charge rank in priority over the claim of any secured creditor of the person.*
>
> ***64.1(3) Restriction*** – *indemnification insurance - The court may not make the order if in its opinion the person could obtain adequate indemnification insurance for the director or officer at a reasonable cost.*
>
> ***64.1(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.*

54. In *Colossus Minerals Inc. (Re)*, Justice H.J. Wilton-Siegel approved the request for a directors' and officers' charge pursuant to section 64.1 of the BIA, and in so doing, highlighted the fact that the continued involvement of the remaining directors and officers was critical to the operations of the company during its BIA proposal proceedings and during the sale process initiated by the company.

Colossus Minerals Inc. (Re), 2014 ONSC 514, at paras. 16 to 21 [Book of Authorities, **TAB 6**]

55. Although Impopharma intends to comply with all applicable laws and regulations, including the timely remittance of deductions at source and federal and provincial sales taxes, the D&Os nevertheless remain concerned about the possibility of their personal liability in the context of the present proceedings given the SISP.

56. Although Impopharma currently maintains directors' and officers' liability insurance (the "**D&O Insurance**"), which is expected to provide the D&Os with some level of protection, such D&O Insurance is set to expire on August 14, 2018, and Impopharma has been unable thus far to confirm the renewal thereof.

57. Moreover, even if such D&O Insurance was renewed, there can be no guarantee to that effect, especially in the context of insolvency proceedings, where Impopharma's insurer cannot be expected to readily agree to be bound to insure hypothetical claims before they are brought and where some exclusions and/or deductibles may apply. Therefore, there may be a risk of a gap in the coverage otherwise provided by the D&O Insurance, which ultimately creates a degree of uncertainty for the D&Os.

58. D&O Charges have been approved in several BIA proceedings where the debtor company seeking such charge in favour of its directors and officers already had director's and officer's insurance policies, but where such policies contained certain limits and exclusions which created uncertainty as to coverage of potential claims. As examples:

Colossus Minerals Inc. (Re), 2014 ONSC 514, at para. 18 [Book of Authorities, **TAB 6**]

Danier Leather Inc. (Re), 2016 ONSC 1044, at para. 60 [Book of Authorities, **TAB 4**]

59. In the present case, Impopharma also respectfully submits that the D&O Charge will provide some assurances to its employees that its obligations towards them for accrued wages, termination and severance pay shall be satisfied. Indeed, while the insolvency of Impopharma and the potential non-payment of various employee obligations may trigger the personal liability of the D&Os, any recourse initiated by Impopharma's employees does not guarantee them any recovery. Therefore, the creation of a security in favour of the aforementioned D&Os for the

sums for which they may be held liable to employees (but for which Impopharma is ultimately liable) enhances such employees' chances of recovery by, in effect, creating a security for their claims.

60. In the matter of *Canwest Publishing Inc. (Re)*, Justice Pepall approved a D&O Charge in the amount of $35 million and, in doing so, took under consideration, *inter alia*, the interest of the employees.

> *"[56] ... Firstly, the charge is essential to the successful restructuring of the LP Entities. The continued participation of the experienced Boards of Directors, management and employees of the LP Entities is critical to the restructuring. Retaining the current officers and directors will also avoid destabilization. Furthermore, a CCAA restructuring creates new risks and potential liabilities for the directors and officers. The charge will not cover all of the directors' and officers' liabilities in a worst case scenario. While Canwest Global maintains D&O liability insurance, it has only been extended to February 28, 2009 and further extensions are unavailable. As of the date of the Initial Order, Canwest Global had been unable to obtain additional or replacement insurance coverage.*
>
> *[57] Understandably, in my view, the directors have indicated that due to the potential for significant personal liability, they cannot continue their service and involvement in the restructuring absent a D&O charge. The charge also provides assurances to the employees of the LP Entities that obligations for accrued wages and termination and severance pay will be satisfied. All secured creditors have either been given notice or are unaffected by the D&O charge. Lastly, the Monitor supports the charge and I was satisfied that the charge should be granted as requested."*
>
> [Emphasis added]
>
> *Re Canwest Publishing Inc.*, 2010 ONSC 222, at paras. 56 and 57 [Book of Authorities, **TAB 7**]

61. Similarly, in the *Aveos Fleet Performance Inc. (Re)* case, in the context of a similar sale process, Justice Schrager, in approving the requested director's and officer's charge, was also sensitive to the arguments that a D&O charge could enhance employee recovery.

> *"[13] The rationale of the D&O charge is to encourage directors and officers to continue to occupy their positions during the restructuring of an insolvent company by providing an assurance that the company will ultimately be able to hold directors harmless for any personal liability incurred by continuing to act as a director after the insolvency filing.*
>
> *[14] The Monitor and counsel for the union suggest another purpose underpinning the D&O charge, namely the ultimate benefit of the employees. Directors are personally liable for certain employee claims. The recourse of employee against directors for various statutory liabilities does not guarantee recovery. Thus, creating security in favour of directors for sums in respect of which they are liable to employees but for which the company is ultimately*

> *liable, enhances the employees' chances of recovery by in effect creating security for their claims.*
>
> *[15] In the present case, realistically, there will be no continuation of the business by the Debtors. A sales process has been approved by this Court and initiated by Aveos under the guidance of the CRO and the Monitor. Hopefully this will result in a sale to one or more persons of all or parts of the assets and business enterprise of Aveos in the best interests of all stakeholders. (...)*
>
> *[...]*
>
> *[20]... On the other hand sufficient arguments have been brought to bear to maintain the D&O charge and the Court is particularly sensitive to the arguments that the charge may enhance employee recovery. Also, the Monitor testified that the $2 million amount suggested in the directors' motion was a compromise number arrived at after discussion between the directors, the Debtors (through the CRO), the Monitor and the secured creditors, following the Court's comments at the first comeback hearing. Communication and compromise between stakeholders in a CCAA file is to be encouraged."*
>
> [Emphasis added]
>
> *Re Aveos Fleet Performance Inc.*, 2012 QCCS 1910, at para. 13, 14, 15 and 20 [Book of Authorities, **TAB 8**]

62. In light of the foregoing, and for the reasons stated in the Application, Impopharma respectfully submits that this Court ought to grant the D&O Charge in the amount of $75,000 over all of Impopharma's assets. It is proposed that such charge be ranked behind the Administration Charge but prior to the KERP Charge.

E. This Court Should Approve the KERP Charge

63. As further discussed in the Odlaug Affidavit, Impopharma has identified certain key employee (the "**Key Employees**") whose continued assistance will be required throughout these proceedings, including during the SISP.

64. Given these Key Employee's position, experience, in-depth knowledge of Impopharma's business and financial situation, Impopharma submits that the retention of the Key Employees will be key to completing a successful SISP.

65. The Key Employees' implication during this challenging period will be especially critical to assist Impopharma and the Trustee in, *inter alia*, preparing and reviewing cash-flow forecasts, managing employee payrolls, responding to creditors and potential purchasers' enquiries and

ensuring that Impopharma continues to maintain a certain level of operations to generate revenues during the SISP.

66. Given Impopharma's financial situation, it is believed that absent the approval by this Court of the Retention Contracts (as defined in the Odlaug Affidavit) and an order granting a priority charge securing Impopharma's obligations thereunder, the Key Employees are likely to resign in order to find employment elsewhere, which would likely create a significant impediment to Impopharma by reducing its chances of successfully completing the SISP and the implementation of any proposal, to the detriment of Impopharma's creditors and stakeholders.

67. Accordingly, in order to incentivize the Key Employees to stay with Impopharma during this critical and challenging period, Impopharma has formulated and is seeking this Court's approval of the Retention Contracts and the amounts payable thereunder, which provide for the payment of certain amounts to the Key Employees upon having met certain milestones.

68. In order to secure the full and complete payment of Impopharma's obligations under the KERP, Impopharma is also seeking this Court's approval of a $550,000 charge over all of its assets, namely the KERP Charge.

69. The KERP Charge is intended to rank after the Administration Charge and the D&O Charge, but prior to any and all other claims, secured or unsecured, against Impopharma. However, vis-à-vis MidCap only, the KERP Charge is intended to rank prior to its security interests against Impopharma's assets, only up to the amount of $360,000, with amount payable under the Retention Contracts over and above such amount being subordinated to the full payment of MidCap's security. Moreover, as set out in the Forbearance Agreement, vis-à-vis MidCap, the amount of the KERP Charge shall be reduced by any payment made to the Key Employees in accordance with the Projected Statement of Cash Flow attached as Schedule D to the Forbearance Agreement.

70. While there is no express statutory jurisdiction under either the BIA or the CCAA for the Court to approve a contract or plan regarding the retention of key employees, Courts have regularly recognized the importance of retaining employees that are vital to a company in the context of insolvency proceedings.

71. Indeed, Key Employee Retention Programs ("**KERPs**") are designed to retain employees that are crucial to the management and operations of the debtor company, keeping them employed at a time when they are likely to seek alternative employment due to the company's financial distress.

72. Below are a few examples where KERPs have been approved in CCAA proceedings where, as is the case herein, the retention of key employees was critical.

> *In the matter of a plan of compromise or arrangement of Boutique Jacob Inc., Amended and Restated Initial Order*, Court File No. 500-11-039940-107, as per Castonguay J., November 25, 2010, at paras. 25-26 [Book of Authorities, **TAB 9**]
>
> *Canwest Publishing Inc. (Re),* [2010] O.J. No. 2052, at paras. *2-3* [Book of Authorities, **TAB 10**]
>
> *In the matter of a plan of compromise or arrangement of Arclin Canada Ltd.*, [2009] O.J. No. 4260 [Book of Authorities, **TAB 11**]

73. KERPs have also been approved in BIA proceedings in similar circumstances where the debtor company sought the protection of the Court in order to proceed with an orderly sale of its assets.

> *Danier Leather Inc. (Re)*, 2016 ONSC 1044, at para. 72-78 [Book of Authorities, **TAB 4**]
>
> *In the Matter of the Notice of Intention of Sensio Technologies Inc.*, Court File No. 500-11-049891-159, December 23, 2015, at paras. 22-23 [Book of Authorities, **TAB 12**]

74. In 2015, the Quebec Superior Court approved a KERP and a KERP Charge in the context where BIA proceedings had been commenced in order to initiate a sale process under the supervision of the Court. In doing so, the Court stated the following:

> *"[16] Dans un premier temps notons que la LFI ne contient aucune interdiction quant à la création d'un Plan de rétention d'employés clés.*
>
> *[...]*
>
> *[20] Le Tribunal conclut qu'en vertu de ses pouvoirs inhérents, il lui est loisible de permettre l'établissement d'une sûreté visant à garantir le paiement des émoluments de certains employés clés."*
>
> *UNOFFICIAL TRANSLATION*

> *"[16] First of all, it should be noted that the BIA contains no provision precluding the creation of a key employee retention program.*
>
> *[...]*
>
> *[20] The Court concludes that pursuant to its inherent powers, it has the discretion to grant a charge securing the payments owed by the company to some of its key employees* "
>
> *Groupe Bikini Village inc. (Proposition de),* 2015 QCCS 1317, at paras. 16-20 [Book of Authorities, **TAB 13**]

75. In determining whether a KERP and a KERP Charge are reasonable under the circumstances, Courts will generally consider the following factors:

(a) whether the monitor or the trustee supports the KERP agreement and the KERP charge;

(b) whether there is a "*potential*" loss of management in that the beneficiaries of the KERP may likely consider other employment opportunities if the KERP and the KERP charge are not approved;

(c) whether the beneficiaries of the KERP are considered to be important to the management and operations of the debtor company;

(d) whether a replacement can be found in a timely manner should the beneficiary elect to terminate his or her employment with the debtor company; and

(e) the business judgment of the board of directors of the debtor company.

> *In the matter of a plan of compromise or arrangement of Grant Forest Products Inc.*, [2009] O.J. No. 3344 [Book of Authorities, **TAB 14**]
>
> See also *In the matter of a proposed plan of compromise or arrangement of Canwest Global Communications Corp.*, [2009] O.J. No. 4286, at para. 50 [Book of Authorities, **TAB 15**]

76. In *Grant Forest Products*, the Court emphasized the fact the business judgment of the directors of the debtor company and the monitor (or proposal trustee) should rarely be ignored when it comes to approving a KERP and a KERP Charge:

> *"The business acumen of the board of directors of* [the debtor company], *including the independent directors, is one that a court should not ignore unless there is good reason on*

> *the record to ignore it. This is particularly so in light of the support of the Monitor and* [the Chief Restructuring Advisor of the debtor company] *for the KERP provisions. Their business judgment cannot be ignored."*
>
> *In the matter of a plan of compromise or arrangement of Grant Forest Products Inc.*, [2009] O.J. No. 3344, at para. 18 [Book of Authorities, **TAB 14**]

77. In the case at hand, the retention of the Key Employees have been and continue to be of vital importance for Impopharma, especially during this critical and challenging period. Impopharma believes that the continued employment of the Key Employees is crucial to the success of the SISP, particularly in light of their respective experience, expertise and the critical role they play and will continue to play for Impopharma.

78. In fact, as stated in the Odlaug Affidavit, prior to these proceedings, some of the Key Employees had already entered into retention contracts, which will be replaced by the Retention Contracts.

79. The Trustee has reviewed and supports the KERP and the granting of the KERP Charge and is of the view that the KERP and the quantum of the proposed retention payments is reasonable and that the KERP Charge will provide security for the Key Employees entitled to the KERP, which will add stability to the business during these proceedings and the SISP.

80. In fact, the implication of these Key Employees throughout these proceedings will obviously facilitate the work to be performed by the professionals, and therefore reduce the costs that are expected to be incurred.

81. Accordingly, it is submitted that this Court ought to grant the KERP Charge.

F. This Court Should Order the Sealing of the Confidential Exhibits

82. In addition to the foregoing, Impopharma seeks an order declaring that its financial statements and the summary table setting forth the identity of the beneficiaries of the Retention Contracts and the amounts payable to them (the "**Retention Contracts Summary Table**") be kept strictly confidential and be filed under seal (collectively, the "**Confidential Exhibits**").

83. With respect to KERPs, in *Re Canwest*, Pepall J. applied the test elaborated by the Supreme Court of Canada in Sierra Club and approved a similar request by the applicants for the sealing of a confidential supplement containing unredacted copies of the KERPs:

> *"In this case, the unredacted KERPS reveal individually identifiable information including compensation information. Protection of sensitive personal and compensation information the disclosure of which could cause harm to the individuals and to the CMI Entities is an important commercial interest that should be protected. The KERP participants have a reasonable expectation that their personal information would be kept confidential. As to the second branch of the test, the aggregate amount of the KERPs has been disclosed and the individual personal information adds nothing. It seems to me that the second branch of the test has been met. The relief requested is granted."*
>
> *In the matter of a proposed plan of compromise or arrangement of Canwest Global Communications Corp.*, [2009] O.J. No. 4286, as per Pepall J., at para. 52 [Book of Authorities, **TAB 15**]

84. In the case at hand, it is submitted, for the following reasons, that both the first and second branch of the Sierra Club test are met:

(a) The audited financial statements and the Retention Contracts Summary Table contain sensitive information about Impopharma and its Key Employees. Impopharma and the Key Employees have a reasonable expectation that such sensitive information will be kept confidential;

(b) in the ordinary course of business, outside the context of these proceedings, the above documents and information would be kept strictly confidential and would not find its way into the public domain; and

(c) keeping the abovementioned information confidential will not have any deleterious effects. In fact, the sealing of any confidential exhibits filed in support of the Odlaug Affidavit would cause no prejudice to Impopharma's creditors and even if it did, it is submitted that the salutary effects of a sealing order outweigh any conceivable deleterious effects.

85. Accordingly, it is submitted that this Court ought to order that the confidential documents filed in support of the Odlaug Affidavit be sealed from and do not form part of the public record, until further order of this Court.

G. This Court Should Extend the Stay of Proceedings

86. Impopharma seeks an order to extend the stay of proceedings resulting from the filing of the NOI through September 30, 2018.

87. Impopharma submits that such an extension is justified based on the fact that the Projected Statement of Cash Flow attached as Schedule D to the Forbearance Agreement, which was developed and agreed upon in conjunction with MidCap, details Impopharma's projected cash flow through September 30, 2018.

88. Further, the SISP and its corresponding proposed milestones as described above, which Impopharma understands are supported by both the Trustee and MidCap, will continue until September 30, 2018.

89. Altogether, an extension of the stay would permit both Impopharma and the Trustee to limit additional legal fees which would be incurred should an extension of the stay have to be sought at a later date.

90. This being said, should one or several satisfactory offers be submitted before then in the context of the SISP, Impopharma will return before this Court to seek its approval thereof.

PART V - CONCLUSION

91. For the reasons stated herein, Impopharma submits that it is both just and convenient to grant the relief sought by it in its Application, and to issue the order appended to its Application Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 27th day of July, 2018.

Stikeman Elliott LLP

Guy Martel/Kathryn Esaw
Lawyers for the Applicant

SCHEDULE "A"
LIST OF AUTHORITIES

Case

1. *Lehndorff General Partner Ltd. (Re)*, [1993] O.J. No. 14
2. *Re Olympia & York Developments Ltd.* (1995), 3 C.B.R. (3d) 93 (Ont. Gen Div.)
3. *Développement Lachine Est Inc (Re)*, Court File No. 500-11-051881-171
4. *Danier Leather Inc. (Re)*, 2016 ONSC 1044
5. Janis P. Sarra, "Having Jumped Off the Cliffs, When Liquidating Why Choose CCAA over Receivership (or vice versa)?" (2013) Annual Review of Insolvency Law
6. *Colossus Minerals Inc. (Re)*, 2014 ONSC 514
7. *Canwest Publishing Inc.*, 2010 ONSC 222
8. *Re Aveos Fleet Performance Inc.*, 2012 QCCS 1910
9. *In the matter of a plan of compromise or arrangement of Boutique Jacob Inc., Amended and Restated Initial Order*, Court File No. 500-11-039940-107
10. *Canwest Publishing Inc. (Re),* [2010] O.J. No. 2052
11. *In the matter of a plan of compromise or arrangement of Arclin Canada Ltd.*, [2009] O.J. No. 4260
12. *In the Matter of the Notice of Intention of Sensio Technologies Inc.*, Court File No. 500-11-049891-159, December 23, 2015
13. *Groupe Bikini Village inc. (Proposition de),* 2015 QCCS 1317
14. *In the matter of a plan of compromise or arrangement of Grant Forest Products Inc.*, [2009] O.J. No. 3344
15. See also *In the matter of a proposed plan of compromise or arrangement of Canwest Global Communications Corp.*, [2009] O.J. No. 4286

SCHEDULE "B"
EXTRACT OF RELEVANT STATUES

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

Extension of time for filing proposal

50.4(9) The insolvent person may, before the expiry of the 30-day period referred to in subsection (8) or of any extension granted under this subsection, apply to the court for an extension, or further extension, as the case may be, of that period, and the court, on notice to any interested persons that the court may direct, may grant the extensions, not exceeding 45 days for any individual extension and not exceeding in the aggregate five months after the expiry of the 30-day period referred to in subsection (8), if satisfied on each application that

(a) the insolvent person has acted, and is acting, in good faith and with due diligence;

(b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and

(c) no creditor would be materially prejudiced if the extension being applied for were granted.

Security or charge relating to director's indemnification

64.1 (1) On application by a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) 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 property of the person is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the person to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer after the filing of the notice of intention or the proposal, as the case may be.

Priority

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

Restriction — indemnification insurance

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

Negligence, misconduct or fault

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

Court may order security or charge to cover certain costs

64.2 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) 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 trustee, including the fees and expenses of any financial, legal or other experts engaged by the trustee in the performance of the trustee's duties;

(b) any financial, legal or other experts engaged by the person for the purpose of proceedings under this Division; 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 the effective participation of that person in proceedings under this Division.

Priority

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

Individual

(3) In the case of an individual,

(a) the court may not make the order unless the individual is carrying on a business; and

(b) only property acquired for or used in relation to the business may be subject to a security or charge.

Courts vested with jurisdiction

183 (1) The following courts are invested with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during their respective terms, as they are now, or may be hereafter, held, and in vacation and in chambers:

(a) in the Province of Ontario, the Superior Court of Justice;

(b) [Repealed, 2001, c. 4, s. 33]

(c) in the Provinces of Nova Scotia and British Columbia, the Supreme Court;

(d) in the Provinces of New Brunswick and Alberta, the Court of Queen's Bench;

(e) in the Province of Prince Edward Island, the Supreme Court of the Province;

(f) in the Provinces of Manitoba and Saskatchewan, the Court of Queen's Bench;

(g) in the Province of Newfoundland and Labrador, the Trial Division of the Supreme Court; and

(h) in Yukon, the Supreme Court of Yukon, in the Northwest Territories, the Supreme Court of the Northwest Territories, and in Nunavut, the Nunavut Court of Justice.

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL UNDER THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3

APPLICATION OF IMPOPHARMA INC. UNDER SECTION 64.1, 64.2 and 183 OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3

Estate/Court File No. 32-2403547

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceedings commenced at Toronto

FACTUM OF THE APPLICANT

STIKEMAN ELLIOTT LLP
40th Floor
1155 René-Lévesque Blvd. West
Montréal, QC H3B 3V2

Guy P. Martel
Tel.: (514) 397-3163
Fax: (514) 397-3222

5300 Commerce Court
199 Bay Street
Toronto, ON M5L 1B9

Kathryn Esaw LSUC#:58264F
Tel: (416) 869-6820
Fax: (416) 947-0866

Counsels to the Applicant