

**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 THE A PLAN OF COMPROMISE OR  
ARRANGEMENT OF PLANT-BASED INVESTMENT CORP. (collectively, the  
"Applicant")

**FACTUM OF THE APPLICANT**

April 28, 2023

**MILLER THOMSON LLP**  
Scotia Plaza  
40 King Street West, Suite 5800  
P.O. Box 1011  
Toronto ON M5H 3S1

**Larry Ellis LSO# 49313K**  
[lellis@millerthomson.com](mailto:lellis@millerthomson.com)  
Tel: 416.595.8639

**Patrick Corney LSO#: 65462N**  
[pcorney@millerthomson.com](mailto:pcorney@millerthomson.com)  
Tel: 416.595.8555

**James W. Reid LSA#: 18109**  
[jwreid@millerthomson.com](mailto:jwreid@millerthomson.com)  
Tel: 403.298.2418

Lawyers for the Applicant

**TO: MSI SPERGEL INC.**  
Proposed Monitor  
200 Yorkland Blvd., Suite 1100  
Toronto, ON., M2J 5C1

**Philip Gennis**  
PGennis@spergel.ca

**Mukul Manchanda**  
T: 416-498-4314  
mmanchanda@spergel.ca

**EMAIL SERVICE LIST**

lellis@millerthomson.com; jwreid@millerthomson.com; pcorney@millerthomson.com;  
akosa@millerthomson.com; mmanchanda@spergel.ca; PGennis@spergel.ca;  
mmanchanda@spergel.ca

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**FACTUM OF THE APPLICANT**

**PART I - INTRODUCTION**

1. Plant-Based Investment Corp. (“**PBIC**” or the “**Applicant**”) brings this application for an initial order and protection from its creditors pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c-C. 36, as amended (the “**CCAA**”).
2. The Applicant seeks an initial order (the “**Initial Order**”) for the following relief, which is necessary to maintain the *status quo* and to give the Applicant the time it requires to develop a restructuring plan in consultation with its advisors and the proposed Monitor:
  - (a) abridging the time for service of the Notice of Application and dispensing with service on any person other than those served;
  - (b) declaring that the Applicant is a party to which the CCAA applies;
  - (c) granting an initial 10-day stay of proceedings (the “**Stay of Proceedings**”) to May 11, 2023 (the “**Stay Period**”);

- (d) appointing msi Spergel Inc. (“**Spergel**”) as Monitor of the Applicant in these proceedings (the “**Proposed Monitor**” and, if appointed, the “**Monitor**”);
- (e) granting an administration charge in the amount of \$150,000 (the “**Initial Administration Charge**”) in favour of counsel for the Applicant, the Proposed Monitor, and its counsel;
- (f) approving the DIP Term Sheet dated April 27, 2023 between the Applicant and 1000492681 Ontario Inc. (the “**DIP Lender**”) for committed terms for DIP financing, authorizing borrowings under the DIP Loan in an amount up to \$200,000 (plus interest, fees and expenses),
- (g) granting a charge in favour of the DIP Lender (“**DIP Lender’s Charge**” and together with the Initial Administration Charge, the “**Priority Charges**”);
- (h) authorizing the Applicant to continue utilizing its cash management system (the “**Cash Management System**”); and
- (i) authorizing PBIC to cease incurring further expenses in relation to the Securities Filings (as defined below) and declaring that none of the directors, officers, employees, and other representatives of the Applicant, or the Monitor (and its directors, officers, employees and representatives) shall have any personal liability for any failure by the Applicant to make Securities Filings.

## PART II - SUMMARY OF FACTS

3. The full facts in support of this application are set out in the Affidavit of Paul Crath, sworn April 28, 2023 (the “**Crath Affidavit**”), filed. All capitalized terms not otherwise defined herein shall have the same meanings prescribed to them in the Crath Affidavit.
4. PBIC is a publicly listed *Canada Business Corporations Act*, RSC 1985, c C-44 (the “**CBCA**”) corporation that trades on the Canadian Securities Exchange (the “**Exchange**”) under the symbol “PBIC”, with a head office in Toronto, Ontario.<sup>1</sup>
5. PBIC is an investment corporation. It holds active and passive investments in public companies, and also invests in private companies. All PBIC’s investee companies derive revenues, earnings, or intellectual property-based value from the Plant-Based Industry.
6. PBIC’s financial position has suffered from the downturn in the market for Plant-Based Industry securities. From and including its 2019 fiscal year, PBIC has operated at a net loss. Over the past four years, PBIC has lost over \$25,000,000 in total asset value: from \$39,805,931 at the end of its 2019 fiscal year to \$14,744,220 as at July 31, 2022 (and very likely even lower as of today). Further, PBIC is effectively out of cash.
7. PBIC can no longer financially support its investments. As such, over the past 18 months, PBIC has relentlessly sought a strategic partner. Unfortunately, none has been found and PBIC has had to liquidate short term assets to generate capital to preserve the value of its most material investments.

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<sup>1</sup> Affidavit of Paul Crath sworn April 27, 2023 (the “**Crath Affidavit**”), at paras. 3, 19.

8. On or around March 6, 2023, PBIC became subject to a cease trade order issued by the Ontario Securities Commission, for failure to make timely filing of its 2022 audited annual financial statements. Accordingly, equity capital is not currently available to PBIC.
9. In late March 2023, PBIC's Chief Executive Officer, Paul Crath, negotiated a loan agreement (the March Loan Agreement) that would have allowed PBIC to fund its immediate critical expenses, including auditor's fees necessary to finalize its fiscal 2022 audited financial statements. After this loan was executed and funded, two then-members of PBIC's board of directors (the "**Board**") stated that they would not attend a Board meeting to approve the March Loan Agreement.
10. No alternative financing solution was provided by these Board members to address PBIC's urgent liquidity needs. The loan was returned on or around April 24, 2023.
11. PBIC has no funded debt, but the liabilities claimed against it exceed \$5,000,000.
12. PBIC cannot pay its liabilities as they come due and faces mounting unpaid bills and multiple litigation claims.
13. PBIC's direct investments, and the investee corporations which PBIC supports, have immediate liquidity needs and the DIP Loan (described below) is the only financing available to PBIC.
14. To finance these proceedings and the continued operations of PBIC, the DIP Lender is willing to provide a \$500,000 loan as debtor-in-possession financing (the "**DIP Loan**").

15. As such, a filing under the CCAA is the best alternative available to PBIC at this time. CCAA protection will provide PBIC with the breathing space for one last attempt to find a strategic investment partner, while in parallel monetizing liquid assets for the benefit of all creditors.
16. If the proposed Initial Order is granted, PBIC will immediately begin to focus on the development of a sale and investment solicitation process (“SISP”). However, given that no strategic partner was found over the past 18 months, an orderly wind-down will be the likely outcome of this proceeding.
17. If the proposed Initial Order is not granted, it is likely that PBIC will make an assignment into bankruptcy and material value in its long-term assets will be lost to the detriment of stakeholders.
18. PBIC has worked with the Proposed Monitor to prepare a consolidated 2-week cash flow forecast for the Applicant for the week ending May 8, 2023 (the “**Cash Flow Forecast**”). The Cash Flow Forecast indicates that, assuming the DIP Loan is advanced, PBIC has sufficient cash flow to operate through the proposed initial Stay Period.
19. To the extent additional facts are necessary to grant the requested relief, they are referred to below.

### **PART III - STATEMENT OF ISSUES**

20. The issues to be determined by this Honourable Court on this application are whether:
- (a) the Applicant is a “debtor company” or “debtor companies” to which the CCAA applies;
  - (b) the Stay of Proceedings should be granted;
  - (c) Spergel should be appointed as Monitor in these CCAA proceedings;
  - (d) the Initial Administration Charge should be approved;
  - (e) the DIP Loan and DIP Lender’s Charge should be approved; and
  - (f) the Applicant should be authorized to incur no further costs in connection with its Securities Filing Obligations (as defined below).

### **PART IV - LAW AND ARGUMENT**

#### **A. The Applicant is a Debtor Company**

21. The CCAA applies in respect of a “debtor company” or “affiliated company” where the total claims against the debtor or affiliates exceeds \$5,000,000.<sup>2</sup> The term “company” is defined in the CCAA as “any company, corporation or legal person incorporated by or under an Act of Parliament or the legislature of a province any incorporated company having assets or doing business in Canada, wherever incorporated...”.<sup>3</sup>

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<sup>2</sup> s. 3(1), *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (“CCAA”).

<sup>3</sup> s. 2(1), CCAA.

22. The term “debtor company” is defined in the CCAA as “any company that: (a) is bankrupt or insolvent...”.<sup>4</sup>
23. The insolvency of a debtor is determined as of the time the debtor files its CCAA application.<sup>5</sup> Courts have held that a company is insolvent under the CCAA if:<sup>6</sup>
- (a) the company meets the definition of “insolvent person” under the BIA, which includes a person “...who is for any reason unable to meet [its] obligations as they generally become due...”;<sup>7</sup> or
  - (b) the company faces a looming liquidity crisis.<sup>8</sup>
24. The Applicant is a “debtor company” within the meaning of the CCAA:
- (a) Applicant was incorporated under the Federal laws of Canada, and has assets and does business in Canada;
  - (b) the claims against the Applicant exceed \$5,000,000; and
  - (c) the Applicant is insolvent and faces a liquidity crisis.<sup>9</sup>

**B. THE STAY OF PROCEEDINGS SHOULD BE GRANTED**

25. Pursuant to section 11.02 of the CCAA, a court may grant a stay of proceedings upon an initial application under the CCAA for a period of no more than ten days, provided that

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<sup>4</sup> s. 2(1), CCAA.

<sup>5</sup> *Re Stelco Inc. (2004)*, 2004 CarswellOnt 1211 (Ont Sup Ct J [Commercial List]), at para. 4 [*Stelco*].

<sup>6</sup> *Stelco*, at paras. 21–22, and 26.

<sup>7</sup> s. 2, *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (“BIA”).

<sup>8</sup> *Stelco*, at para. 40.

<sup>9</sup> Crath Affidavit, at paras 9, 13, 67.

the court is satisfied that circumstances exist that make the order appropriate.<sup>10</sup> A stay of proceedings is appropriate where it provides a debtor with breathing room while the debtor seeks to restore solvency and emerge from the CCAA on a going concern basis.<sup>11</sup>

26. Section 11.001 of the CCAA further provides:<sup>12</sup>

An order made under section 11 at the same time as an order made under subsection 11.02(1) or during the period referred to in an order made under that subsection with respect to an initial application shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

27. The purpose of section 11.001 “is to make the insolvency process fairer, more transparent and more accessible by limiting the decisions made at the outset of the proceedings to measures that are reasonably necessary to avoid the immediate liquidation of an insolvent company and to allow for broader participation in the restructuring process.”<sup>13</sup> This section ensures that the relief granted upon an initial application is limited to the relief reasonably necessary for the debtor to continue to operate in the ordinary course.<sup>14</sup>

28. The Applicant submits that given its current financial condition, liquidity crisis, and mounting litigation, the Stay of Proceedings at this time is in its best interests, and is both necessary and appropriate.

29. The Applicant has limited the relief sought on this application to what is reasonably necessary to maintain the *status quo* during the period prior to the comeback hearing and

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<sup>10</sup> s. 11.02, CCAA; [Re Lydian International Limited](#), 2019 ONSC 7473 at para. 22 [*Lydian*].

<sup>11</sup> [Target Canada Co.](#), 2015 ONSC 303 at para. 8.

<sup>12</sup> s. 11.001, CCAA.

<sup>13</sup> [Re Clover Leaf Holdings Company](#), 2019 ONSC 6966 at para. 13.

<sup>14</sup> *Lydian* at paras. 30, 32.

to give the Applicant the breathing space it requires to develop a restructuring plan in consultation with its advisors and the Monitor.<sup>15</sup>

30. The Applicant also requests that the Stay of Proceedings extend to its directors and officers. Section 11.03 of the CCAA provides that an order made under section 11.02 of the CCAA may provide that no person may commence or continue any action against a director of the company or any claim against directors that arose before the commencement of proceedings under the CCAA and that relates to the obligations of the company.<sup>16</sup>
31. The Applicant submits that the Stay of Proceedings should be extended to the Applicant's directors and officers so that they may focus on the CCAA proceedings and developing and executing a path forward to have the business emerge from CCAA protection in a substantially smaller, but stronger, form that preserves their business value, goals, and objectives.

**C. THE ADMINISTRATION CHARGE SHOULD BE GRANTED**

32. The Applicant seeks a first-ranking priority Initial Administration Charge over the Property (as defined in the Initial Order) in the maximum amount of \$150,000, in favour of the Monitor, counsel to the Monitor, and counsel to the Applicant (collectively, the **"Professionals Group"**), to secure payment of their professional fees and disbursements, whether incurred before or after the date of the Initial Order.

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<sup>15</sup> Crath Affidavit, at paras. 15, 17, 94.

<sup>16</sup> s. 11.03, CCAA.

33. The Court may grant an administration charge pursuant to section 11.52 of the CCAA.<sup>17</sup>

In deciding whether to grant an administration charge, the courts have considered a number of factors including:<sup>18</sup>

- (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.

34. The Applicant submits that it is appropriate for this Court to exercise its discretion to grant the Initial Administration Charge:

- (a) the business is publically traded, has multiple categories of assets which may each require different monetization strategies, has suffered from recent corporate governance disputes, and is facing multiple litigation claims;
- (b) there are no secured creditors who will be affected by the Initial Administration Charge;

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<sup>17</sup> s. 11.52, CCAA.

<sup>18</sup> [Canwest Publishing Inc. Re](#), 2010 ONSC 222 at para. 54; see also, *Lydian* at para. 46.

- (c) the Professionals Group will have extensive involvement during the CCAA proceedings and will play a critical role in assisting the Applicant with its restructuring efforts;
- (d) the Professionals Group has contributed and will continue to contribute to the Applicant's restructuring efforts, each have and will continue to perform a distinct function, and in any event, will ensure that there is no unnecessary duplication of roles among them; and<sup>19</sup>
- (e) the quantum of the proposed Initial Administration Charge is reasonable and necessary for the initial Stay Period, and is in line with the nature and size of the Applicant's business and the involvement required by the Professionals Group for this period.<sup>20</sup>

**D. THE DIP LOAN AND DIP LENDERS CHARGE SHOULD BE APPROVED**

- 35. The Applicant is seeking approval of the DIP Loan and the second-ranking DIP Lender's Charge over the Property (as defined in the Initial Order) in favour of the DIP Lender, to secure amounts borrowed by the Applicant pursuant to the DIP Term Sheet.<sup>21</sup>
- 36. Section 11.2 of the CCAA allows this Honourable Court to grant the DIP Loan and the DIP Lender's Charge in an amount that the Court considers appropriate having regard to the Applicant's Cash Flow Forecast.<sup>22</sup>

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<sup>19</sup> Crath Affidavit, at para. 80.

<sup>20</sup> Crath Affidavit, at paras. 79, 81.

<sup>21</sup> Crath Affidavit, at paras. 17(e), 77, 82, Exhibit Q.

37. Section 11.2(5) provides that a court shall not grant an order for interim financing at the same time as granting an initial order under section 11.2 unless it is satisfied that the terms of the loan are limited to those terms that are reasonably necessary for the Applicant's continued operations in the ordinary course of business during the initial stay of proceedings.<sup>23</sup> What is considered "reasonably necessary" depends on the facts of each case.<sup>24</sup>
38. In determining whether the DIP Lender's Charge is appropriate, a Court is required to consider the following factors under section 11.2(4) of the CCAA:<sup>25</sup>
- (a) the period during which the company is expected to be subject to proceedings under the CCAA;
  - (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, if any.

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<sup>22</sup> s. 11.2(1), CCAA.

<sup>23</sup> s. 11.2(5), CCAA.

<sup>24</sup> [8440522 Canada Inc., Re](#), 2013 ONSC 6167 at para. 30.

<sup>25</sup> s. 11.2(4), CCAA

39. The Applicant submits that it is appropriate for this Court to exercise its discretion to approve the DIP Loan and grant the DIP Lender's Charge:
- (a) PBIC only intends to remain under CCAA protection as long as reasonably necessary;
  - (b) the Applicant's business will be managed in consultation with the Proposed Monitor;
  - (c) Pursuant to the Cash Flow Forecast, the Applicant will not have sufficient funds to get through the initial Stay Period absent interim financing being approved and the DIP Lender's Charge being granted by the Court.<sup>26</sup>
  - (d) the DIP Loan is critical to the Applicant's ability to maximize stakeholder value through a SISP;
  - (e) the Applicant's material assets are illiquid, meaning that a bankruptcy would likely erode stakeholder value; and
  - (f) no creditors will be prejudiced because PBIC has no funded debt.
40. The following additional factors support the approval of the DIP Term Sheet and the granting of the DIP Lender's Charge:
- (a) the availability of the DIP Loan is contingent on an order of this Court approving same and the DIP Lender's Charge; and

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<sup>26</sup> Crath Affidavit at paras. 16, 73, 74.

(b) if the Initial Order is granted, the Applicant intends to return to court for the Comeback Hearing to request an extension of the Stay of Proceedings and approval of a SISP.

41. The terms of the DIP Term Sheet and the amount of the DIP Charge is required and reasonable in the circumstances.<sup>27</sup>

**E. SPERGEL SHOULD BE APPOINTED AS MONITOR OF THE APPLICANT**

42. Under section 11.7 of the CCAA, a court is required to appoint a person to monitor the business and financial affairs of a debtor company at the time that an initial order is made.<sup>28</sup>

43. Section 11.7(2) of the CCAA also sets out certain requirements for and restrictions on who may act as a monitor, including that the monitor be a trustee within the meaning of subsection 2 of the BIA.<sup>29</sup>

44. Spergel is a trustee within the meaning of section 2 of the BIA and is not subject to any of the restrictions pursuant on who may be appointed as monitor set out in section 11.7(2) of the CCAA.<sup>30</sup> Spergel has acted in a pre-filing financial advisor role to PBIC and understands the business and the challenges it faces.

45. For the reasons noted above and further set out in the Crath Affidavit, the Applicant submits that Spergel ought to be appointed by the Court as Monitor of the Applicant in these CCAA proceedings.

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<sup>27</sup> Crath Affidavit, at paras. 70, 72–73.

<sup>28</sup> s. 11.7, CCAA.

<sup>29</sup> s. 11.7(2).

<sup>30</sup> Monitor's Consent to Act dated April 27, 2023, Application Record of the Applicants at Tab 3.

**F. CASH MANAGEMENT SYSTEM**

46. The Applicant seeks the Court’s authority to continue to utilize its existing Cash Management System.
47. This Court has the jurisdiction to approve the continued utilization of the Cash Management System pursuant to section 11 of the CCAA, which provides that “the court ... may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.”<sup>31</sup>
48. The Applicant submits that the approval of the Cash Management System is reasonable and necessary in the circumstances. The Applicant and the Proposed Monitor are of the view that the continued use of the existing Cash Management System is required and appropriate during these CCAA Proceedings.<sup>32</sup>
49. The Cash Management System will be monitored by the Proposed Monitor throughout the CCAA proceedings. If appointed, and as part of its monitoring procedures, the Proposed Monitor will, among other things<sup>33</sup>:
- (a) monitor the Applicant’s receipts and disbursements; and
  - (b) monitor all payments, obligations, and any transfers as between the Applicant, consistent with the Cash Management System.

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<sup>31</sup> s. 11, CCAA.

<sup>32</sup> Crath Affidavit, at paras. 44 – 45, 84.

<sup>33</sup> Crath Affidavit, at para. 85.

**G. THE APPLICANT SHOULD BE AUTHORIZED TO INCUR NO FURTHER COSTS IN CONNECTION WITH ITS SECURITIES FILING OBLIGATIONS**

50. The Applicant seeks authorization to dispense with certain securities filing requirements. In particular, the Applicant seeks authorization for PBIC to incur no further expenses in relation to any filings (including financial statements), disclosures, core or non-core documents, restatements, amendments to existing filings, press releases, or any other actions (collectively, the “**Securities Filings**”) that may be required by any federal, provincial, or other law respecting securities or capital markets in Canada, or by the rules and regulations of a stock exchange, including without limitation, the *Securities Act (Ontario)*, RSO 1990 c S. 5, as amended, and comparable statutes enacted by other provinces of Canada, and comparable statutes enacted by other provinces of Canada, the rules, regulations and policies of the *Exchange*.
51. The Applicant is also seeking a declaration that none of the directors, officers, employees, and other representatives of the Applicant, and the Monitor (and its directors, officers, employees, and representatives) shall have any personal liability for any failure by PBIC to make Securities Filings.
52. The Ontario Superior Court of Justice, Commercial List, has granted similar relief in favour of several reporting issuers commencing proceedings under the CCAA.<sup>34</sup>

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<sup>34</sup> *CannTrust Holdings Inc., Re*, Initial Order issued March 31, 2020 [Court File No. CV-20-00638930-00CL] at paras. 46–47; *Pure Global Cannabis, Inc., Re*, Initial Order issued March 19, 2020 [Court File No. CV-20-00638503-00CL] at para. 49; *Old PSG Wind-down Ltd., Re*, Order issued December 20, 2017 [Court File No. CV-16-11582-00CL] at para. 12.

53. Incurring the time and costs associated with preparing the Security Filings would detract from the Applicant's successful restructuring by diverting important financial and non-financial resources.
54. For all of the reasons, the Applicant requests that the Court grant the requested authorization and declaration in respect of the Securities Filings. Further, there is no prejudice to stakeholders given that detailed financial information and other information regarding the Applicant will continue to be made publicly available through the materials filed in these CCAA proceedings.

#### **PART V - ORDER REQUESTED**

55. Based on the foregoing, the Applicant requests that this Honourable Court grant an Initial Order and provide the Applicant creditor protection under the CCAA.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 28<sup>th</sup> day of April, 2023.



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Miller Thomson LLP

**MILLER THOMSON LLP**  
Scotia Plaza  
40 King Street West, Suite 5800  
P.O. Box 1011  
Toronto ON M5H 3S1

**Larry Ellis LSO# 49313K**  
[lellis@millerthomson.com](mailto:lellis@millerthomson.com)  
Tel: 416.595.8639

**Patrick Corney LSO#: 65462N**  
[pcorney@millerthomson.com](mailto:pcorney@millerthomson.com)  
Tel: 416.595.8555

**James W. Reid LSA#: 18109**  
[jwreid@millerthomson.com](mailto:jwreid@millerthomson.com)  
Tel: 403.298.2418

Lawyers for the Applicant

**SCHEDULE “A”  
LIST OF AUTHORITIES**

1. [Re Stelco Inc. \(2004\)](#), 2004 CarswellOnt 1211 (Ont Sup Ct J [Commercial List])
2. [Re Lydian International Limited](#), 2019 ONSC 7473
3. [Target Canada Co.](#), 2015 ONSC 303
4. [Re Clover Leaf Holdings Company](#), 2019 ONSC 6966
5. [Canwest Publishing Inc. Re](#), 2010 ONSC 222
6. [8440522 Canada Inc., Re](#), 2013 ONSC 6167
7. [CannTrust Holdings Inc., Re](#), Initial Order issued March 31, 2020 [Court File No. CV-20-00638930-00CL]
8. [Pure Global Cannabis, Inc., Re](#), Initial Order issued March 19, 2020 [Court File No. CV-20-00638503-00CL]
9. [Old PSG Wind-down Ltd., Re](#), Order issued December 20, 2017 [Court File No. CV-16-11582-00CL]

**SCHEDULE “B”  
RELEVANT STATUTES**

***Companies’ Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended***

**Definitions**

**2(1)** In this Act...

**company** means any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province, any incorporated company having assets or doing business in Canada, wherever incorporated, and any income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the *Bank Act*, telegraph companies, insurance companies and companies to which the *Trust and Loan Companies Act* applies;

...

**debtor company** 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;

**Application**

**3 (1)** This Act applies in respect of a debtor company or affiliated debtor companies if the total of claims against the debtor company or affiliated debtor companies, determined in accordance with section 20, is more than \$5,000,000 or any other amount that is prescribed.

**Affiliated companies**

(2) For the purposes of this Act,

(a) companies are affiliated companies if one of them is the subsidiary of the other or both are subsidiaries of the same company or each of them is controlled by the same person; and

(b) two companies affiliated with the same company at the same time are deemed to be affiliated with each other.

**Company controlled**

(3) For the purposes of this Act, a company is controlled by a person or by two or more companies if

- (a) securities of the company to which are attached more than fifty per cent of the votes that may be cast to elect directors of the company are held, other than by way of security only, by or for the benefit of that person or by or for the benefit of those companies; and
- (b) the votes attached to those securities are sufficient, if exercised, to elect a majority of the directors of the company.

### **Subsidiary**

(4) For the purposes of this Act, a company is a subsidiary of another company if

- (a) it is controlled by
  - (i) that other company,
  - (ii) that other company and one or more companies each of which is controlled by that other company, or
  - (iii) two or more companies each of which is controlled by that other company; or
- (b) it is a subsidiary of a company that is a subsidiary of that other company

### **General power of court**

**11** Despite anything in the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

### **Relief reasonably necessary**

**11.001** An order made under section 11 at the same time as an order made under subsection 11.02(1) or during the period referred to in an order made under that subsection with respect to an initial application shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

### **Stays, etc. — initial application**

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

- (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;
- (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

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

**Stays, etc. — other than initial application**

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

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

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

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

**Burden of proof on application**

(3) The court shall not make the order unless

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

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

**Restriction**

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

**Stays — directors**

**11.03 (1)** 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.

**Exception**

(2) Subsection (1) does not apply in respect of an action against a director on a guarantee given by the director relating to the company's obligations or an action seeking injunctive relief against a director in relation to the company.

**Persons deemed to be directors**

(3) If all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the company is deemed to be a director for the purposes of this section

**Priority — secured creditors**

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

**Priority — other orders**

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

**Factors to be considered**

- (4) In deciding whether to make an order, the court is to consider, among other things,
- (a) the period during which the company is expected to be subject to proceedings under this Act;
  - (b) how the company's business and financial affairs are to be managed during the proceedings;
  - (c) whether the company's management has the confidence of its major creditors;
  - (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
  - (e) the nature and value of the company's property;
  - (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
  - (g) the monitor's report referred to in paragraph 23(1)(b), if any.

**Additional factor — initial application**

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

**Interim financing**

**11.2 (1)** On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the

company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

**Priority — secured creditors**

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

**Priority — other orders**

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

**Factors to be considered**

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

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

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

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

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

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

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

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

**Additional factor — initial application**

(5) When an application is made under subsection (1) at the same time as an initial application referred to in subsection 11.02(1) or during the period referred to in an order made under that subsection, no order shall be made under subsection (1) unless the court is also satisfied that the

terms of the loan are limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

### **Security or charge relating to director's indemnification**

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

#### **Priority**

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

#### **Restriction — indemnification insurance**

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

#### **Negligence, misconduct or fault**

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

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

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

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

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

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

#### **Priority**

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

### **Court to appoint monitor**

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

### **Restrictions on who may be monitor**

**(2)** Except with the permission of the court and on any conditions that the court may impose, no trustee may be appointed as monitor in relation to a company

**(a)** if the trustee is or, at any time during the two preceding years, was

**(i)** a director, an officer or an employee of the company,

**(ii)** related to the company or to any director or officer of the company, or

**(iii)** the auditor, accountant or legal counsel, or a partner or an employee of the auditor, accountant or legal counsel, of the company; or

**(b)** if the trustee is

**(i)** the trustee under a trust indenture issued by the company or any person related to the company, or the holder of a power of attorney under an act constituting a hypothec within the meaning of the *Civil Code of Quebec* that is granted by the company or any person related to the company, or

**(ii)** related to the trustee, or the holder of a power of attorney, referred to in subparagraph (i).

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

#### **Interpretation**

#### **Definitions**

**2** In this Act...

***insolvent person*** means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

**(a)** who is for any reason unable to meet his obligations as they generally become due,

**(b)** who has ceased paying his current obligations in the ordinary course of business as they generally become due, or

**(c)** the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due;

...

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

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C.  
1985, c.C-36 AS AMENDED AND IN THE MATTER OF A PLAN OF COMPROMISE  
OR ARRANGEMENT OF PLANT-BASED INVESTMENT CORP. *et al.*

Court File No CV-23-

*ONTARIO*  
**SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)**

Proceedings commenced at Toronto

**FACTUM OF THE APPLICANT  
(CCAA INITIAL APPLICATION)**

**MILLER THOMSON LLP**

Scotia Plaza  
40 King Street West, Suite 5800  
P.O. Box 1011  
Toronto ON M5H 3S1

**Larry Ellis LSO# 49313K**

[lellis@millერთomson.com](mailto:lellis@millერთomson.com)

Tel: 416.595.8639

**Patrick Corney LSO#: 65462N**

[pcorney@millერთomson.com](mailto:pcorney@millერთomson.com)

Tel: 416.595.8555

**James W. Reid LSA#: 18109**

[jwreid@millერთomson.com](mailto:jwreid@millერთomson.com)

Tel: 403.298.2418

Lawyers for the Applicant

