

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

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985,
c.C-36 AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF
PLANT-BASED INVESTMENT CORP.

Applicant

**FACTUM OF THE APPLICANT
(Motion Returnable June 8, 2023)**

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Applicant

**FACTUM OF THE APPLICANT
(Motion Returnable June 9, 2023)**

PART I - INTRODUCTION

1. Plant Based Investment Corp. (“**PBIC**” or the “**Applicant**”) obtained an initial order (the “**Initial Order**”) on May 1, 2023 under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c-C. 36.¹

2. Pursuant to the Initial Order, the Court:

- (a) appointed msi Spergel inc. as monitor of the Applicant (“**Monitor**”);
- (b) granted an initial 10-day stay period (the “**Initial Stay Period**”) up to and including May 11, 2023;
- (c) approved debtor-in-possession financing (the “**DIP Loan**”) from 1000492681 Ontario Inc. (“the “**DIP Lender**”), up to a maximum initial borrowing amount of

¹ The Initial Order can be found on the Monitor’s website: <https://www.spergelcorporate.ca/engagements/plant-based-investment-corp/>.

\$200,000 (plus interest, fees, and expenses), and a corresponding charge in favour of the DIP Lender (the “**DIP Lender’s Charge**”);

- (d) granted an administration charge in the amount of \$150,000 in favour of counsel for the Applicant, the Monitor, and the Monitor’s Counsel (the “**Administration Charge**”);
- (e) approved the following priority ranking of the DIP Lender’s Charge and the Administration Charge:
 - (i) First – Administration Charge; and
 - (ii) Second – DIP Lender’s Charge; and
- (f) authorized the Applicant to carry on business in a manner consistent with the preservation of its Property, the proposed restructuring, and to make certain payments in connection with its business.

3. At the comeback hearing on May 11, 2023 (“**Comeback Hearing**”), the Court granted an amended and restated initial order that, among other things:

- (a) approved an extension of the Initial Stay Period to June 9, 2023;
- (b) granted relief from securities disclosure reporting obligations;
- (c) increased the Administration Charge to \$250,000; and

- (d) approved an increase in the borrowing limit under the DIP Loan up to the maximum amount of \$500,000, and granted a corresponding increase to the DIP Lender's Charge.

4. On this motion, the Applicant seeks the following orders:

- (a) an order (the "**SISP Order**") substantially in the form of the draft order at **Tab "3"** to the Motion Record, among other things, approving a sale and investment solicitation process ("**SISP**") in respect of the Applicant's business and assets; and
- (b) a further amended and restated initial order (the "**Further ARIO**") substantially in the form of the draft order at **Tab "4"** to the Motion Record, among other things:
 - (i) approving an amended and restated debtor-in-possession term sheet dated June 1, 2023 (the "**Amended and Restated DIP Term Sheet**") and made between the Company and the DIP Lender, together with a corresponding increase to the DIP Lender's Charge, to a maximum amount of \$1 million (from \$500,000 currently);
 - (ii) granting a charge in favour of the current directors and officers of the Applicant in the amount of \$100,000 (the "**Directors' Charge**");
 - (iii) approving the sale of non-material assets in the amount of \$100,000 in any one transaction and \$200,000 in the aggregate, with the written consent of the Monitor; and

- (iv) extending the stay of proceedings to and including August 25, 2023 (the “**Extended Stay Period**”).

PART II - THE FACTS

5. The facts underlying this Motion are more fully set out in the affidavits of Paul Crath sworn April 28, 2023 (“**First Crath Affidavit**”), May 8, 2023 (“**Second Crath Affidavit**”), and June 6, 2023 (“**Third Crath Affidavit**”). Paul Crath is the Chief Executive Officer, Vice President Corporate Development, and General Counsel of PBIC.²

6. PBIC is a public corporation incorporated under the *Canada Business Corporations Act* and listed on the Canadian Securities Exchange (the “**Exchange**”) under the symbol “PBIC”. Its head office is located in Toronto, Ontario.³

7. PBIC is an “investment company” as defined under Policy 2 of the Exchange. PBIC’s status as an investment company enhances value insofar as it is permitted to raise capital to invest in businesses that are to be identified. This flexibility is attractive to capital market participants.⁴

8. PBIC invests in public and private companies that derive a portion of their revenues, earnings or intellectual property-based value from products, equipment, services and/or technologies related to plant-based industries, including the cannabis plant family and its various compounds, the fungi industry (including medicinal, functional and psychedelics), super-foods and/or organic ingredients industries in addition to investing in specialty retail locations,

² Copies of the First Crath Affidavit and the Second Crath Affidavit are attached as Exhibits “A” and “B”, respectively, to the Affidavit of Paul Crath Sworn June 6, 2023 (“**Third Crath Affidavit**”), Tab 2 to the Motion Record of the Applicant dated June 6, 2023 (the “**Motion Record**”).

³ Second Crath Affidavit, at para. 6, Tab 2B to the Motion Record.

functional medicine and wellness-based clinics and treatment centers (the “**Plant-Based Industry**”).⁵

9. PBIC makes debt and equity investments in the Plant-Based Industry. It makes active and passive investments in public companies, and also invests in private companies.⁶

10. The Applicant applied for the Initial Order on May 1, 2023 because it had insufficient funds to sustain operations after that date.

A. PBIC’s Activities since the Comeback Hearing

11. Since the Comeback Hearing, the Applicant has, with the assistance of its legal counsel and the Monitor, among other things:⁷

- (a) continued to communicate with landlords, investors, and other key stakeholders;
- (b) worked with the Monitor to design the SISP;
- (c) responded to inquiries from third parties;
- (d) negotiated the Amended and Restated DIP Term Sheet with the DIP Lender; and
- (e) worked with the Monitor to discuss, identify, and realize cash flow efficiencies, and prepared a weekly forecast (the “**Updated Cash Flow Forecast**”) for the Extended Stay Period.⁸

⁴ Second Crath Affidavit, at para. 7, Tab 2B to the Motion Record.

⁵ Second Crath Affidavit, at para. 8, Tab 2B to the Motion Record.

⁶ Second Crath Affidavit, at para. 9, Tab 2B to the Motion Record.

⁷ Third Crath Affidavit, at para. 10, Tab 2 to the Motion Record.

⁸ A copy of the Updated Cash Flow Forecast will be appended to the Monitor’s Second Report, to be filed.

B. Details of the Proposed SISP

12. The Applicant is seeking the Court’s approval of the proposed SISP, which is designed to maximize recoveries for the Applicant’s creditors. The proposed SISP is a flexible process, soliciting proposals for the purchase or investment in some or all of the Applicant’s assets, including its business, or a combination thereof (the “**Opportunity**”).⁹

13. The SISP was designed to provide transparency throughout the process to ensure potential bidders are aware of timelines and requirements for bids, as well as the assessment criteria that will be used by the Monitor to select the successful bid(s). The Applicant has, with the assistance of its advisors and the Monitor, considered various structures and timelines for the SISP, with the goal of crafting the best process to maximize stakeholder value. Ultimately, it was decided that the Monitor could implement the SISP, in consultation with the Applicant when deemed necessary by the Monitor.¹⁰

14. The details of the SISP are summarized in the Third Crath Affidavit and in the Monitor’s Second Report to be filed on this motion. The below table provides a high level summary of the key stages of the SISP:¹¹

Stage	Description	Proposed Timing
Preparation	<ul style="list-style-type: none">• Assemble due diligence information• Set-up of electronic Data Room• Identify Known Potential Bidders• Prepare Teaser Letter and template NDA	No later than the Commencement Date

⁹ Third Crath Affidavit, at para. 10, Tab 2 to the Motion Record.
¹⁰ Third Crath Affidavit, at paras. 13-16, Tab 2 to the Motion Record.
¹¹ Third Crath Affidavit, at para. 13, Tab 2 to the Motion Record.

<p>Notice and solicitation of interest</p>	<ul style="list-style-type: none"> • Publish print and digital notice of the SISP in such publications as the Monitor considers appropriate, post the SISP on the Monitor’s website, issue a press release setting out key information regarding the SISP • Teaser Letter and NDA to be delivered to all Known Potential Bidders to notify them of the Opportunity 	<p>Commencement Date: no later than June, 13, 2023</p>
<p>Due diligence and bidding</p>	<ul style="list-style-type: none"> • In order to be considered as a Qualified Bidder, each Potential Bidder will deliver to the Monitor an executed NDA and required disclosure information • Qualified Bidders to be provided access to the Data Room • Bids due by Bid Deadline • Bids to indicate if a Sale Proposal, Investment Proposal or Hybrid Proposal and will include the required information and terms specified in the SISP • Monitor to assess Bids using the criteria outlined in the SISP to determine Qualified Bids 	<p>Six-week period immediately following Commencement Date</p> <p>Bid Deadline: 5:00 p.m. Eastern Standard Time on the date that is six weeks form the Commencement Date</p>
<p>Evaluation of Bids and settlement of definitive documents</p>	<ul style="list-style-type: none"> • Monitor to select the Successful Bid(s) • Settle and execute binding agreement(s) regarding the Successful Bid(s) 	<p>No later than two weeks from the Bid Deadline</p>
<p>Sale approval hearing</p>	<ul style="list-style-type: none"> • Motion for Court approval of the Successful Bid(s) 	<p>No later than 10 Business Days from the selection of the Successful Bid(s), subject to the availability of the Court</p>

15. The proposed SISP carefully balances efficiency with the need to provide sufficient time to expose the assets and allow interested parties to complete diligence. It is contemplated that the

process will be completed before the end of the proposed Extended Stay Period on August 25, 2023.¹²

16. The proposed SISP is also highly flexible in that it allows interested parties to submit various types of proposals, including a “Sale Proposal”, an “Investment Proposal”, or a “Hybrid Proposal”. It also provides the Monitor with the discretion and flexibility required to adapt and respond to the market’s interest in the Opportunity and developments in the Applicant’s business, all with a view to identifying the best possible transaction for the sale of the assets.¹³

C. Additional DIP Funding Required

17. The Updated Cash Flow Forecast prepared with the assistance of the Monitor shows that the Applicant will require additional funding to complete the SISP and fund operations in the ordinary course during the proposed Extended Stay Period.¹⁴

18. The Applicant is therefore seeking approval of the Amended and Restated DIP Term Sheet, which contemplates an increase in the borrowing limit under the DIP Loan to \$1 million and a corresponding increase to the DIP Lender’s Charge.

19. The Amended and Restated DIP Term Sheet also contains the following changes from the initial DIP Term Sheet:

- (a) a fee of \$15,000 on account of fees earned for a loan transaction arranged in March, 2023, which was described in the First Crath Affidavit, that did not close (the “**March Loan Fee**”), which, at the DIP Lender’s option, may be satisfied by

¹² Third Crath Affidavit, at para. 14, Tab 2 to the Motion Record.

¹³ Third Crath Affidavit, at para. 15, Tab 2 to the Motion Record.

¹⁴ Third Crath Affidavit, at para. 17, Tab 2 to the Motion Record. A copy of the Updated Cash Flow Forecast is appended to the Monitor’s Second Report, to be filed.

the transfer of 150,000 shares of Delota Corp., or shares of another investee entity at a valuation to be determined, with the approval of the Monitor;¹⁵

- (b) The availability of any advance under the DIP Loan is conditional upon Court approval of the SISP Order;¹⁶ and
- (c) The Applicant is required to provide the DIP Lender with two days' written notice of any requested advance.¹⁷

D. Directors' Charge

20. The Applicant's Directors' and Officers' insurance policy will expire on or around June 9, 2023. While the Applicant is hopeful that a tail policy may be purchased at a reasonable cost, such a tail policy may be cost-prohibitive or contain unfavourable exclusions. In any event, the Applicant will not be able to bind a policy before the return of the within motion on June 8, 2023.¹⁸ The Applicant therefore seeks the Directors' Charge as security for the Applicant's indemnification for possible liabilities that may be incurred by the current directors and officers, to a maximum of \$100,000.¹⁹

21. The proposed quantum of the Directors' Charge was decided upon with the input of the Monitor's counsel. The Directors' Charge is intended to reflect reasonable legal fees that may be incurred by the PBIC's Directors and Officers to defend post-filing claims.²⁰

22. The Directors' Charge is proposed to rank behind the Administration Charge and the DIP Lender's Charge.²¹

¹⁵ Amended and Restated DIP Term Sheet dated June 1, 2023, section 6, Exhibit "E", Tab 2E to the Motion Record.

¹⁶ Amended and Restated DIP Term Sheet dated June 1, 2023, section 11(c), Exhibit "E", Tab 2E to the Motion Record.

¹⁷ Amended and Restated DIP Term Sheet dated June 1, 2023, Exhibit "E", Tab 2E to the Motion Record.

¹⁸ Third Crath Affidavit, at para. 32, Tab 2 to the Motion Record.

E. Proposed Ranking of Priority Charges

23. If the relief sought on this motion is granted, the proposed amended priority ranking of the Administration Charge, the DIP Lender's Charge and the Directors' Charge (the "**Priority Charges**") would be as follows:²²

- (i) First – Administration Charge;
- (ii) Second – DIP Lender's Charge; and
- (iii) Third – Directors' Charge.

PART III - ISSUES AND THE LAW

24. The issues to be addressed before this Honourable Court are whether:

- (a) the SISP should be approved;
- (b) the Amended and Restated DIP Term Sheet and the corresponding increase to the DIP Lender's Charge should be approved;
- (c) the Directors' Charge should be granted;
- (d) the Applicant should be permitted to dispose of non-material assets of \$100,000 in any one transaction and \$200,000 in the aggregate; and
- (e) the Extended Stay Period should be granted.

¹⁹ Third Crath Affidavit, at para. 33, Tab 2 to the Motion Record.

²⁰ Third Crath Affidavit, at para. 34, Tab 2 to the Motion Record.

²¹ Third Crath Affidavit, at para. 35, Tab 2 to the Motion Record.

²² Proposed Amended and Restated Initial Order, paragraph 40, Tab 4 to the Motion Record.

A. The SISP Should Be Approved

25. In exercising the broad powers to facilitate restructurings conferred by the remedial nature of the CCAA, the Court considers a number of factors in connection with the approval of a sale process:²³

26. In considering whether to approve a sale process, a court may consider whether:²⁴

- (a) a transaction is warranted at this time;
- (b) the sale will benefit the whole economic community;
- (c) creditors have a *bona fide* reason to object to a sale of the business; and
- (d) there is a better viable alternative.

27. Although not strictly applicable to approval of a sale process, courts have also considered the factors set out in section 36(3) of the CCAA:²⁵

- (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
- (b) whether the monitor approved of the process leading to the proposed sale or disposition;
- (c) whether the monitor filed a report with the court stating that in their opinion the sale or disposition would be more beneficial to creditors than a sale or disposition in bankruptcy;

²³ [Nortel Networks Corp., Re](#), 2009 CanLII 39492 (ON SC), at para 49; [Brainhunter Inc., Re \(2009\)](#), 183 ACWS (3d) 905 at para 13; [Danier Leather Inc., Re](#), 2016 ONSC 1044, at para 23.

²⁴ [Nortel Networks Corp., Re](#), at para 49; [Brainhunter Inc., Re \(2009\)](#), at para. 13.

- (d) the extent to which creditors were consulted;
- (e) the effects of the proposed sale or disposition on creditors and other interested parties; and
- (f) whether the consideration to be received for the assets is reasonable and fair, taking into consideration their market value.

28. The Applicant is of the view that the proposed SISP should be approved for the following reasons:

- (a) A sale process is warranted at this time, as PBIC can no longer financially support its investments and has exhausted all other available alternative sources of funding.²⁶ Without cash nourishment, the value of the Applicant's assets will decline and then collapse.²⁷
- (b) A sale process is necessary to identify a third party or third parties that can take over the investment maintenance obligations of the Applicant's assets;²⁸
- (c) A sale will benefit the whole economic community by maximizing stakeholder value. The sale process is a transparent and flexible process and is intended to identify a value-maximizing transaction for the benefit of all of the Applicant's stakeholders.
- (d) PBIC does not have any secured indebtedness.²⁹

²⁵ *Danier Leather Inc., Re*, 2016 ONSC 1044, at para. 34 (applying the same factors as found in the CCAA, and BIA, to grant a SISP).

²⁶ First Crath Affidavit at para 9, Exhibit "A" to the Third Crath Affidavit, Tab 2A to the Motion Record.

- (e) There is no other, better, or viable alternative: In the absence of a sale process and sale of the Applicant's assets, it is expected that the value of the Applicant's assets and business will be lost.³⁰
- (f) The Monitor was consulted and will administer the SISP. Since the Comeback Hearing, PBIC has worked with the Monitor to develop the structure and timelines of the SISP with the goal of crafting the best process to maximize stakeholder value. The SISP will be administered by the Monitor in consultation with the Applicant, as and if requested.

29. The SISP is the best and only value-maximizing option now available to the Applicant. The process provides interested parties with sufficient time to evaluate the Opportunity and to submit a bid before the deadline. The Monitor is of the view that the SISP is fair and reasonable in the circumstances.

B. The Amended and Restated DIP Term Sheet and DIP Lender's Charge should be Approved

30. The Applicant seeks to increase the DIP Lender's Charge from \$500,000 to \$1 million, together with a corresponding increase to the DIP Lender's Charge.

31. Section 11.2 of the CCAA allows this Honourable Court to grant a DIP Lender's Charge in an amount that the Court considers appropriate having regard to the Applicant's Cash Flow Forecast.³¹

²⁷ Third Crath Affidavit at para 23, Tab 2 to the Motion Record.

²⁸ Third Crath Affidavit at para 23, Tab 2 to the Motion Record.

²⁹ First Crath Affidavit at para 69, Exhibit "A" to the Third Crath Affidavit, Tab 2A to the Motion Record.

³⁰ Third Crath Affidavit at para 23, Tab 2 to the Motion Record.

32. In determining whether the increased DIP Lender's Charge is appropriate, a Court is required to consider the following factors under section 11.2(4) of the CCAA:³²

- (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.

33. 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 Monitor;

³¹ s. 11.2(1), CCAA.

³² s. 11.2(4), CCAA

- (c) Pursuant to the Updated Cash Flow Forecast, the Applicant will not have sufficient funds to get through the Extended Stay Period absent the funds to be provided under the Amended and Restated DIP Term Sheet, which is contingent upon the increased DIP Lender's Charge being granted by the Court.
- (d) As illustrated by the Updated Cash Flow Forecast, the Applicant cannot conduct the SISP without the additional funds made available under the Amended and Restated DIP Term Sheet. The additional DIP Loan funds will be used for: working capital in accordance with the Updated Cash Flow Forecast; professional fees and expenses, including expenses related to the preparation and implementation of the SISP; and such other costs and expenses as may be agreed to by the DIP Lender.³³
- (e) most of the Applicant's material assets are illiquid, and need ongoing financial support, meaning that a bankruptcy would likely erode stakeholder value;
- (f) no creditors will be prejudiced because PBIC has no funded debt; and
- (g) the Monitor supports the proposed increased DIP Lender's Charge.

C. The Directors' Charge should be Granted

34. Pursuant to section 11.51 of the CCAA, a court may grant a Directors' Charge on a super-priority basis.

³³ Third Crath Affidavit at para 28, Tab 2 to the Motion Record.

35. The purpose of a Directors' Charge was described in *Canwest Global Communications Corp. (Re)*:³⁴

The purpose of such a charge is to keep the directors and officers in place during the restructuring by providing them with protection against liabilities they incur during the restructuring . . . Retaining the current directors and officers of the applicants would avoid destabilization and would assist in the restructuring. The proposed charge would enable the applicants to keep the experienced board of directors supported by the experienced senior management.

36. In *Jaguar Mining Inc. (Re)*, the court set out the following factors to be considered with respect to the approval of a directors' charge:³⁵

- (a) whether notice has been given to the secured creditors likely to be affected by the charge;
- (b) whether the amount is appropriate;
- (c) whether the applicant could not obtain adequate indemnification insurance for the director or officer at a reasonable cost; and
- (d) whether the charge does not apply in respect of any obligation incurred by a director or officer as a result of the director's or officer's gross negligence or wilful misconduct.

37. The Applicant's Directors' and Officers' insurance policy is set to expire during the Extended Stay Period and there is limited cash available to obtain a new policy.³⁶

³⁴ [*Canwest Global Communications Corp. \(Re\)*](#): [2009] OJ No 4286 at para. 48 (Ont Sup Ct J [Commercial List]).

³⁵ [*Jaguar Mining Inc. \(Re\)*](#), 2014 ONSC 494 at para. 45.

³⁶ Third Crath Affidavit at para 32, Tab 2 to the Motion Record.

38. To ensure the ongoing stability of the Applicant's business during the CCAA proceedings, it requires the continued participation of their officers and directors. The officers and directors have skills, knowledge and expertise, as well as established relationships with various stakeholders that will contribute to a successful restructuring, including assisting with conducting the proposed SISP.

39. The quantum of the proposed Directors' Charge was developed with the assistance and support of the Monitor.

D. The Applicant Should be Allowed to Dispose of Non-Material Assets

40. The Applicant seeks permission to dispose of non-material assets of \$100,000 in any one transaction and \$200,000 in the aggregate.

41. The Applicant intends to sell its liquid investments to supplement the DIP Loan financing. The value of these investments will not be increased by a SISP and therefore it is in the best interests of stakeholders to monetize them now. The ability to monetize non-material assets will ensure the Applicant can reasonably maximize its cash flow without expending limited resources on Court approval.³⁷

42. Such non-material asset sales are already contemplated and included in the Court's Model Order, as the Court recognizes that downsizing of a business where necessary should be done in a manner that avoids multiple Court applications to dispose of assets.³⁸

43. The Monitor approves of the proposed limits on non-material asset dispositions.

³⁷ Third Crath Affidavit at para 31, Tab 2 to the Motion Record.

44. Further, any revenue obtained will bolster the Applicant's cash flow and provide additional breathing room, without the need to incur additional resources to seek Court approval for each transaction.

E. The Extended Stay Period Should Be Granted

45. The Applicants seek to extend the stay of proceedings up to and including August 25, 2023.

46. A court may grant an extension of the stay of proceedings where the court is satisfied that (a) circumstances exist that make the order appropriate; and (b) the debtor has acted, and is continuing to act, in good faith and with due diligence.³⁹

47. A stay of proceedings is appropriate to provide a debtor with breathing room while it tries to stabilize its operations, and develop and implement a SISP to maximize value for stakeholders.

48. The Applicant has acted in good faith and with due diligence since the Comeback Hearing. The Applicant has, among other things, worked with the Monitor to develop the SISP, communicated with stakeholders, negotiated the Amended and Restated DIP Term Sheet, and worked with the Monitor to assist in the preparation of the Updated Cash Flow Forecast.⁴⁰

49. The proposed stay extension is reasonable in light of the Updated Cash Flow Forecast, and will provide the Applicant with a sufficient amount of time and the breathing room necessary to implement the SISP.

³⁸ *In the Matter of the Bankruptcy of Bear Creek Contracting Ltd.*, 2021 BCSC 783, at para. 48 (approving an applicant to dispose of non-material assets up to \$100,000 in any one transaction, and \$1,000,000 in the aggregate).

³⁹ s 11.02(2) and (3), CCAA.

⁴⁰ Third Crath Affidavit at para 32, Tab 2 to the Motion Record.

50. The Applicant, along with the Monitor, does not believe any creditor or stakeholder will suffer material prejudice as a result of this Court granting the extension of the stay. No stakeholder has objected to the extension of the stay.

PART IV - ORDER REQUESTED

51. The Applicant respectfully requests that this Honourable Court grant the relief provided for in the draft Orders at **Tabs “3”** and **“4”** to the Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 6th day of June, 2023.



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**SCHEDULE “A”
LIST OF AUTHORITIES**

1. [Nortel Networks Corp., Re](#), 2009 CanLII 39492 (ON SC)
2. [Brainhunter Inc., Re \(2009\)](#), 183 ACWS (3d) 905
3. [Danier Leather Inc., Re](#), 2016 ONSC 1044
4. [Canwest Global Communications Corp. \(Re\)](#): [2009] OJ No 4286 at para. 48 (Ont Sup Ct J [Commercial List])
5. [Jaguar Mining Inc. \(Re\)](#), 2014 ONSC 494
6. [In the Matter of the Bankruptcy of Bear Creek Contracting Ltd.](#), 2021 BCSC 783

**SCHEDULE “B”
RELEVANT STATUTES**

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

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.

Stays, etc. — other than initial application

11.02(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.

Meaning of regulatory body

11.1 (1) In this section, regulatory body means a person or body that has powers, duties or functions relating to the enforcement or administration of an Act of Parliament or of the legislature of a province and includes a person or body that is prescribed to be a regulatory body for the purpose of this Act.

Regulatory bodies — order under section 11.02

(2) Subject to subsection (3), no order made under section 11.02 affects a regulatory body’s investigation in respect of the debtor company or an action, suit or proceeding that is taken in

respect of the company by or before the regulatory body, other than the enforcement of a payment ordered by the regulatory body or the court.

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.

Restriction on disposition of business assets

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

Notice to creditors

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

Factors to be considered

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

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

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

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

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

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

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

Additional factors — related persons

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

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

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

Related persons

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

(a) a director or officer of the company;

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

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

Assets may be disposed of free and clear

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

Restriction — employers

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

Restriction — intellectual property

(8) If, on the day on which an order is made under this Act in respect of the company, the company is a party to an agreement that grants to another party a right to use intellectual property that is included in a sale or disposition authorized under subsection (6), that sale or disposition does not affect that other party's right to use the intellectual property — including the other party's right to enforce an exclusive use — during the term of the agreement, including any period for which the other party extends the agreement as of right, as long as the other party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C.
1985, c.C-36 AS AMENDED

Court File No CV-23-00698826-00CL

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF
PLANT-BASED INVESTMENT CORP.

Applicant

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

Proceedings commenced at Toronto

**FACTUM OF THE APPLICANT
(RETURNABLE JUNE 8, 2023)**

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