

**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 May 11, 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@millერთhompson.com
Tel: 416.595.8639

Patrick Corney LSO#: 65462N
pcorney@millერთhompson.com
Tel: 416.595.8555

James W. Reid LSA#: 18109
jwreid@millერთhompson.com
Tel: 403.298.2418

Lawyers for the Applicant

TO THE SERVICE LIST

SERVICE LIST

TO:	<p>MILLER THOMSON LLP Scotia Plaza 40 King Street West, Suite 5800 P.O. Box 1011 Toronto, Ontario, M5H 3S1</p> <p>Larry Ellis lellis@millerthomson.com Tel: 416.595.8639</p> <p>Patrick Corney pcorney@millerthomson.com Tel: 416.595.8555</p> <p>James W. Reid jwreid@millerthomson.com Tel: 403.298.2418</p> <p>Counsel for the Applicant</p>
AND TO:	<p>msi Spergel inc. 200 Yorkland Blvd., Suite 1100 Toronto, Ontario, M2J 5C1</p> <p>Mukul Manchanda mmanchanda@spergel.ca Tel: 416.498.4314</p> <p>Philip Gennis PGennis@spergel.ca Tel: 416.498.4325</p> <p>Monitor</p>
AND TO:	<p>GOWLING WLG (CANADA) LLP 1 First Canadian Place 100 King Street West, Suite 1600 Toronto, Ontario, M5X 1G5</p> <p>Clifton P. Prophet clifton.prophet@gowlingwlg.com Tel: 416.862.3509</p> <p>Heather Fisher heather.fisher@gowlingwlg.com Tel: 416.369.7202</p>

	Counsel for the Monitor
AND TO:	CRAIG 26 DEVELOPMENTS INC. Goeusl@aol.com
AND TO:	DENTONS CANADA LLP 77 King Street West, Suite 400 Toronto, Ontario, M5K 0A1 Kelly Osaka kelly.osaka@dentons.com Tel: 403.268.3017 Counsel for CanadaBis Capital Inc.
AND TO:	CLARK HILL LLC 3800 Howard Hughes Parkway, Suite 500 Las Vegas, Nevada, 89169 Michael V Cristalli, Esq. mcristalli@clarkhill.com Tel: 702.862.8300 William D. Schuller, Esq. wschuller@clarkhill.com Tel: 702.862.8300 Counsel for Jamie L. Pearson
AND TO:	CASSELS BROCK & BLACKWELL LLP Suite 2100, Scotia Plaza, 40 King Street West Toronto, Ontario, M5H 3C2 Marc Mercier mmercier@cassels.com Tel: 416.869.5770 Counsel for Francesco G. Policaro
AND TO:	JWZ HOLDINGS, LLC 225 15 th Street Manhattan Beach, California, 90266 John W. Ziegler jz@solfiregroup.com Representative for 483 Driggs Avenue Inc.

AND TO:	PROACTIVE INVESTORS NORTH AMERICA 750 West Pender Street, Unit 401 Vancouver, British Columbia, V6C 2T7 accounts@proactiveinvestors.com
AND TO:	PAUL CRATH 20 Scrivener Square, Apt 810 Toronto, Ontario, M4W 3X9 paulcrath@gmail.com
AND TO:	GRAHAM SIMMONDS 134 Kitzbuhl Cres Blue Mountains, Ontario, L9Y 0S5 jgrahamsimmonds@gmail.com
AND TO:	SEAN CONACHER sconacher@gmail.com
AND TO:	MICHAEL JOHNSTON mike@fa.ca
AND TO:	NAEEM HUKKAWALA Naeem.hukk@gmail.com
AND TO:	MINISTRY OF FINANCE Ministry of the Attorney General Collections Branch – Bankruptcy and Insolvency Unit 6-33 King St West Oshawa, Ontario, L1H 8H5 insolvency.unit@ontario.ca Tel: 1 866 668-8297

AND TO:	ATTORNEY GENERAL OF CANADA Per: Diane Winters, General Counsel Department of Justice 120 Adelaide Street West Suite 400 Toronto, Ontario, M5H 1T1 Diane H. A. Winters diane.winters@justice.gc.ca Tel: 647.256.7459 Fax: 416.973.0810
AND TO:	CHAITONS LLP 5000 Yonge Street, 10 th Floor Toronto, Ontario, M2N 7E9 Maya Poliak maya@chaitons.com Tel: 416.218.1161 Counsel for Ontario Securities Commission

EMAIL SERVICE LIST

lellis@millerthomson.com; pcorney@millerthomson.com; jwreid@millerthomson.com;
mmanchanda@spergel.ca; PGennis@spergel.ca; clifton.prophet@gowlingwlg.com;
heather.fisher@gowlingwlg.com; Goeusl@aol.com; kelly.osaka@dentons.com;
mcristalli@clarkhill.com; wschuller@clarkhill.com; mmercier@cassels.com;
jz@solfiregroup.com; accounts@proactiveinvestors.com; paulcrath@gmail.com;
jgrahamsimmonds@gmail.com; sconacher@gmail.com; mike@fa.ca; Naeem.hukk@gmail.com;
insolvency.unit@ontario.ca; diane.winters@justice.gc.ca; maya@chaitons.com

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**FACTUM OF THE APPLICANT
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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:

- (a) The Applicant is a company to which the CCAA applies;
- (b) msi Spergel Inc. was appointed as monitor of the Applicant (“**Monitor**”);
- (c) An initial 10-day stay period (the “**Initial Stay Period**”) was granted through May 11, 2023;
- (d) The following charges against the Property were granted, in the following priority rankings (the “**Priority Charges**”):

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

- (i) First – Administration Charge; and
 - (ii) Second – DIP Lender’s Charge; and
 - (e) The Applicant was authorized 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. This is the “comeback motion” by the Applicant for an order:
- (a) Abridging the time for and validating service of the Notice of Motion and Motion Record and dispensing with service on any person other than those served;
 - (b) Approving an extension of the Initial Stay Period to June 9, 2023 (the “**Extended Stay Period**”);
 - (c) Granting relief from securities disclosure reporting obligations;
 - (d) Increasing the Administration Charge to \$250,000;
 - (e) Increasing the DIP Lender’s Charge to \$500,000; and
 - (f) Permitting the Applicant to dispose of non-material assets to \$100,000 in any one transaction and \$200,000 in the aggregate.

PART II - THE FACTS

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

5. 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.²

6. 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.³

7. 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, functional medicine and wellness-based clinics and treatment centers (the “**Plant-Based Industry**”).⁴

8. PBIC makes debt and equity investments in the Plant-Based Industry. It makes active and passive investments in public companies,⁵ and also invests in private companies.⁵

9. The Applicant applied for the Initial Order on May 1, 2023 because it had insufficient funds to sustain operations after that date. The Initial Order set a “comeback” return date of May 11, 2023 to address the relief sought on this motion.⁶

² Second Crath Affidavit, at para. 6, Motion Record Tab 2, Caselines Master A25.

³ Second Crath Affidavit, at para. 7, Motion Record Tab 2, Caselines Master A25.

⁴ Second Crath Affidavit, at para. 8, Motion Record Tab 2, Caselines Master A25.

⁵ Second Crath Affidavit, at para. 9, Motion Record Tab 2, Caselines Master A26.

A. PBIC's Activities since the Initial Order

10. Since the Initial Order was granted, the Applicant has, with the assistance of its legal counsel and the Monitor, among other things:

- (a) drafted and distributed a press release to advise stakeholders of the CCAA proceeding;
- (b) communicated with counsel to the Ontario Securities Commission (the “OSC”), regarding the proposed “relief from reporting obligations” language found at paragraphs 42 and 43 of the proposed ARIO;
- (c) published a notice of CCAA proceedings in the Globe & Mail;
- (d) communicated with landlords, key stakeholders, and investors;
- (e) begun developing a sale and investment solicitation process (“SISP”);
- (f) considered PBIC’s ability to maintain its status as an investment company following CCAA exit;
- (g) responded to inquiries from third parties who have expressed interest in participating in a SISP; and
- (h) met 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.⁷

⁶ See the [Initial Endorsement of Justice Conway, dated May 1, 2023](#); Second Crath Affidavit, at para. 10, Motion Record Tab 2, Caselines Master A26.

⁷ Second Crath Affidavit, at para. 13, Motion Record Tab 2, Caselines Master A27.

PART III - ISSUES AND THE LAW

11. The issues to be addressed before this Honourable Court are whether:
- (a) The Extended Stay Period should be granted;
 - (b) Relief from reporting obligations should be granted;
 - (c) The Priority Charges should be increased; and
 - (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.

A. The Extended Stay Period Should be Granted

12. The Applicants seek an Extended Stay Period up to and including June 9, 2023.

13. 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.⁸

14. 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.⁹

15. The Applicant has acted in good faith and with due diligence since the Initial Order. During the Initial Stay Period, the Applicant has, among other things, stabilized its operations,

⁸ s 11.02(2) and (3), *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 ("CCAA").

⁹ *Target Canada Co, Re*, [2015 ONSC 303](#) at para. 8.

begun developing a SISP, communicated with stakeholders, and provided information relating to the CCAA proceedings.¹⁰

16. The Applicant had meetings with the Monitor to discuss, identify, and realize cash flow efficiencies, to determine appropriate investment management spending, and to assist Monitor in its preparation of the Updated Cash Flow Forecast.¹¹

17. The proposed Extended Stay Period 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 finalize the SISP, including to hold discussions with the relevant regulators regarding how PBIC can maintain its investment company status following its emergence from CCAA protection. As a result of the potential value represented by the Applicant's investment company status and by existing tax attributes in the company, the Applicant is taking care to design a SISP that maximizes the value of these sources of recovery.¹²

18. 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 Extend Stay Period and no creditor or stakeholder has objected, or signalled an intention to object, to the relief sought at this comeback motion.¹³

19. The Applicant intends to return to Court for approval of the SISP on May 26, 2023, and has booked Court time for that purpose.¹⁴

¹⁰ Second Crath Affidavit, at para. 13, Motion Record Tab 2, Caselines Master A27.

¹¹ Second Crath Affidavit, at para. 13, Motion Record Tab 2, Caselines Master A27.

¹² Second Crath Affidavit, at para. 19, Motion Record Tab 2, Caselines Master A28.

B. Relief from Reporting Obligations Should Be Granted

20. The Applicant seeks authorization to dispense with certain securities filing requirements for the duration of the Stay Period. In particular, PBIC seeks authorization for PBIC to incur no further expenses in relation any filings (including financial statements), disclosures, core or non-core documents and, press releases or any other actions (the “**Securities Filings**”) that may be required.

21. 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.

22. Nothing in the operative paragraphs of the draft ARIO prohibits any securities regulator or stock exchange from taking any action or exercising any discretion that it may have of a nature described in section 11.1(2) of the CCAA.

23. The relevant paragraphs in the draft ARIO were drafted with the input of the OSC.

24. The Ontario Superior Court of Justice, Commercial List, has granted similar relief in favour of several reporting issuers commencing proceedings under the CCAA.¹⁵

25. Incurring the time and costs associated with preparing the Securities Filings would detract from the Applicant’s successful restructuring by diverting important financial and non-financial resources.¹⁶

¹³ Second Crath Affidavit, at para. 20, Motion Record Tab 2, Caselines Master A29.

¹⁴ Second Crath Affidavit, at para. 20, Motion Record Tab 2, Caselines Master A29].

26. 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.

C. The Priority Charges Should Be Increased

(i) Administration Charge

27. The Applicant seeks to increase the Administration Charge from \$100,000 to \$250,000 to provide security for the professional fees and disbursements of the Monitor, counsel for the Monitor, and counsel for the Applicant (collectively, the “**Professional Group**”) during the Extended Stay Period.

28. A court may grant an administration charge in a CCAA proceeding pursuant to section 11.52 of the CCAA.¹⁷ In deciding whether to grant an administration charge, courts have considered a number of factors including: (a) the size and complexity of the businesses being restructured; (b) the role of the beneficiaries of the charge; (c) whether there is unwarranted duplication of roles; (d) whether the amount 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.¹⁸

¹⁵ *Field Trip Health & Wellness Inc., Re* [Court File No. CV-23-00696599-00CL], [Amended Initial Order dated March 23, 2023](#), at paras. 36 and 37; *Inscape Corporation et al., Re* [Court File No. CV-23-00692784-00CL], [Initial Order dated January 12, 2023](#), at paras. 36-38.

¹⁶ Second Crath Affidavit, at para. 27, Motion Record Tab 2, Caselines Master A30.

¹⁷ s 11.52, CCAA.

¹⁸ *Canwest Publishing Inc., Re*, 2010 ONSC 222 at para. 54; *Re Lydian International Limited*, 2019 ONSC 7473 at para. 46.

29. The Applicant submits that it is appropriate for this Court to exercise its discretion to increase the Administration Charge.

- (a) The quantum of the increased Administration Charge is in line with the nature and size of the Applicant's business and the involvement required by the professional advisors;
- (b) The Professional Group will play a critical role in assisting the Applicant with the SISP and the progression of these CCAA proceedings. To that point, after the Initial Order was granted, the Applicant began exploring the possibility of the Applicant maintaining its investment corporation status with the Exchange, post-CCAA exit, which could create significant stakeholder value. However, to pursue this possibility, the Applicant will require securities law advice and incur related legal fees that were not contemplated at the time of the Initial Order was granted;¹⁹
- (c) Each proposed beneficiary of the Administration Charge is performing a distinct function: there is no duplication of roles;²⁰
- (d) The Applicant believes that these additional professional fees are necessary and reasonable in light of the potential stakeholder value that could be unlocked;²¹
- (e) There are no secured creditors in the instant case; and
- (f) The Monitor supports the proposed increased Administration Charge.

(ii) DIP Lender's Charge

30. The Applicant seeks to increase the DIP Lender's Charge from \$200,000 to \$500,000.

This increase reflects the full Second Advance (\$300,000) under the DIP Loan.

¹⁹ Second Crath Affidavit, at para. 23, Motion Record Tab 2, Caselines Master A29.

²⁰ First Crath Affidavit, para. 91, Motion Record Tab 2A, Caselines Master A61.

²¹ Second Crath Affidavit, at para. 23, Motion Record Tab 2, Caselines Master A29.

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.²²

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:²³

- (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;

²² s. 11.2(1), CCAA.

²³ 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 Second Advance, which is contingent upon the increased DIP Lender's Charge being granted by the Court.²⁴
- (d) The Second Advance under the DIP Loan is necessary to necessary for the Applicant to maintain value in its investments and to and maximize stakeholder value through a SISP. In particular, the Second Advance will be used for: working capital (including the funding of certain investee company expenses, as described in the First Report) in accordance with the Updated Cash Flow Forecast; professional fees and expenses, including expenses related to the preparation and implementation of, and motion for Court approval of, the SISP; and such other costs and expenses as may be agreed to by the DIP Lender.²⁵
- (e) most of the Applicant's material assets are illiquid, 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.

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

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

35. 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

²⁴ First Crath Affidavit at paras. 16, 73, 74, Motion Record Tab 2A, Caselines Master A16 and A56-57; First Crath Affidavit, Exhibit "Q" [Caselines May 1 Bundle].

²⁵ Second Crath Affidavit, at para. 24, Motion Record Tab 2, Caselines Master A30.

assets will ensure the Applicant can reasonably maximize its cash flow without expending limited resources on Court approval.²⁶

36. 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.²⁷

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

38. 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.

PART IV - ORDER REQUESTED

39. The Applicant respectfully requests that this Honourable Court grant the relief provided for in the ARIO.

²⁶ Second Crath Affidavit, at para. 32, Caselines Master A31.

²⁷ *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).

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 9th day of May, 2023.

patrick corney

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

Tel: 416.595.8639

Patrick Corney LSO#: 65462N

pcorney@millerthomson.com

Tel: 416.595.8555

James W. Reid LSA#: 18109

jwreid@millerthomson.com

Tel: 403.298.2418

Lawyers for the Applicant

**SCHEDULE “A”
LIST OF AUTHORITIES**

1. [Target Canada Co, Re](#), 2015 ONSC 303
2. [Field Trip Health & Wellness Inc., Re](#) [Court File No. CV-23-00696599-00CL], [Amended Initial Order dated March 23, 2023](#)
3. [Inscape Corporation et al., Re](#) [Court File No. CV-23-00692784-00CL], [Initial Order dated January 12, 2023](#)
4. [Old PSG Wind-down Ltd., Re](#), Order issued December 20, 2017 [Court File No. CV-16-11582-00CL]
5. [Canwest Publishing Inc., Re](#), 2010 ONSC 222
6. [Re Lydian International Limited](#), 2019 ONSC 7473
7. [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

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.

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.

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 MAY 11, 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@millერთhompson.com

Tel: 416.595.8639

Patrick Corney LSO#: 65462N

pcorney@millერთhompson.com

Tel: 416.595.8555

James W. Reid LSA#: 18109

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Tel: 403.298.2418

Lawyers for the Applicant