C A N A D A

PROVINCE OF QUÉBEC DISTRICT OF **MONTREAL**	**SUPERIOR COURT** Commercial Division (Sitting as a court designated pursuant to the *Companies' Creditors Arrangement Act*, R.S.C., c. 36, as amended)
N°: **500-11**	**IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF:** **BLOOM LAKE GENERAL PARTNER LIMITED** **BLOOM LAKE RAILWAY COMPANY LIMITED** **QUINTO MINING CORPORATION** **856391 CANADA LIMITED** **CLIFFS QUÉBEC IRON MINING ULC** Petitioners **THE BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP** Mise-en-cause -and- **FTI CONSULTING CANADA INC.** Proposed Monitor

PETITIONERS' OUTLINE OF ARGUMENTS
(In support of their Motion for the issuance of an Initial Order)

1. INTRODUCTION[1]

1. By way of their *Motion for the Issuance of an Initial Order* (the "**Motion**"), the Petitioners and the Mise-en-Cause (the "**CCAA Parties**") seek protection from their creditors under the *Companies' Creditors Arrangement Act* (the "**CCAA**"). As will be shown below, the Initial Order requested by the Petitioners (and filed as Exhibit R-2 to the Motion) is consistent with the provisions of the CCAA and the applicable case law, and it is appropriate for this Court to exercise its discretion to grant such relief.

[1] All capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Motion.

2. JURISDICTION

2. The Petitioners respectfully submit that they are debtor companies to which the CCAA applies pursuant to section 3(1) of the CCAA:

> **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.

2.1 The Petitioners are Companies

3. The CCAA defines "company" as follows:

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

4. The Petitioners are "companies" within the meaning of the CCAA:

   a) CQIM is an unlimited liability company continued under the *Business Corporations Act* (British Columbia) ("**BCBCA**");[3]

   b) Bloom Lake GP is a corporation incorporated under the *Business Corporations Act* (Ontario) ("**OBCA**");[4]

   c) Bloom Lake Railway Company is a corporation incorporated under the *Corporations Act* (Newfoundland and Labrador);[5]

   d) Quinto is a corporation incorporated under the BCBCA;[6]

   e) 8568391 is a corporation incorporated under the *Canada Business Corporation Act* ("**CBCA**").[7]

5. As recently affirmed in *Montréal, Maine & Atlantique Canada Co. (Re)*, the courts have the inherent jurisdiction to extend the protection of the CCAA to railway companies, such as Bloom Lake Railway Company, despite the exclusion in the CCAA definition of a "company":

---

2 CCAA, s. 2.

3 Motion, paras. 53 to 55 and Exhibit R-9.

4 Motion, para. 23 and Exhibit R-3.

5 Motion, para. 34 and Exhibit R-6.

6 Motion, para. 41 and Exhibit R-7.

7 Motion, para. 47 and Exhibit R-8.

> [10] MMA, à ses procédures, admet être une compagnie de chemins de fer au sens de la législation fédérale en matière de transport, mais plaide que l'inclusion « chemin de fer » à l'article 2 de la Loi et qui ferait en sorte qu'elle ne pourrait s'en prévaloir, constitue un anachronisme.
>
> [11] D'ailleurs, les compagnies de chemins de fer sont également exclues de l'application de la *Loi sur la faillite et l'insolvabilité* (ci-après la « LFI »).
>
> [12] Ainsi, en raison de cette double exclusion, les compagnies de chemins de fer ne peuvent ni déclarer faillite, aux termes de la LFI, ni proposer un arrangement à leurs créanciers aux termes de la Loi. […]
>
> [18] **En présence de ce vide juridique entourant certaines catégories de créanciers, que peut et que doit faire le Tribunal ?**
>
> [19] **La solution à ce problème passe par l'application de la doctrine dite de la juridiction inhérente des tribunaux.** […]
>
> [24] Appliquer la *Loi* de façon aveugle et refuser à MMA le droit de s'en prévaloir équivaudrait à une injustice flagrante des droits des créanciers ordinaires dont les sinistrés de Lac Mégantic ce qui est tout à fait inacceptable dans une société de droit.
>
> [25] De plus, tenter de gérer une situation d'insolvabilité en appliquant une loi pour certains créanciers et une autre loi pour d'autres créanciers risquerait de provoquer une incohérence, sinon, une injustice.
>
> [26] **Le Tribunal conclut qu'il est nécessaire de combler le vide juridique créé lors du remaniement des lois canadiennes en matière de transport et permettre à MMA de se prévaloir des dispositions de la Loi, et ce, pour l'ensemble de ses créanciers**.[8] [Emphasis added; reference omitted]

2.2 The Petitioners are insolvent

6. Pursuant to section 2 of the CCAA, a "debtor company" means, *inter alia*, a company that is either insolvent or bankrupt:

> "**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,

---

[8] *Montréal, Maine & Atlantique Canada Co. (Arrangement relatif à)*, 2013 QCCS 4039, paras. 8-26 **(Tab 1)**.

> (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;

7. While the CCAA does not define "insolvent", the CCAA courts commonly refer to the definition of "insolvent person" under section 2 of the BIA:

> "**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;

8. As Justice Farley held in the leading case of *Re Stelco Inc.*,[9] the BIA test for insolvency should be given an expanded meaning in CCAA proceedings in order to give effect to the rehabilitative goal of the CCAA. Justice Farley found in this case that "insolvency" under the CCAA also includes a situation in which a corporation is "*reasonably expected to run out of liquidity within [a] reasonable proximity of time as compared with the time reasonably required to implement a restructuring*".[10]

   A company need only satisfy one of the criteria identified in the definition of "insolvent person" under section 2 of the BIA in order to be determined insolvent for the purposes of the CCAA.[11] The Petitioners respectfully submit that this burden is met in the present case:

   - The CCAA Parties are no longer generating any revenue and no further revenue is anticipated to be generated in the short term;[12] and
   - The CCAA Parties have limited cash resources and such resources are insufficient to pay their liabilities in the normal course.[13]

---

9 *Stelco Inc., Re*, 2004 CanLII 24933 (ON SC), leave to appeal to C.A. refused: 2004 CarswellOnt 2936 (Ont. C.A.), leave to appeal to S.C.C. refused: 2004 CarswellOnt 5200 (S.C.C.) **(Tab 2)**.

10 *Id.*, para. 26.

11 *Id.*, para. 28.

12 Motion, para. 212.

13 Motion, para. 213.

2.3 Claims total more than $5,000,000

9. As described in the Motion, as of November 30, 2014, the Petitioners are affiliated companies within the meaning of section 3(2) of the CCAA with aggregate liabilities of over $6.49 billion.[14] This indebtedness far exceeds the $5 million minimum threshold for protection under the CCAA.

3. STAY OF PROCEEDINGS

3.1 Petitioners

10. Section 11.02(1) of the CCAA allows a CCAA court to order a stay that temporarily enjoins creditors from pursuing claims against the debtor company "*on any terms that it may impose*":

> **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 30 days,
>
> (*a*) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;
>
> (*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> (*c*) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

11. Pursuant to Section 11.02(3) of the CCAA, the CCAA petitioner bears the burden of satisfying the court that circumstances exist that make the stay order appropriate:

> **11.02** (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.

12. A stay order is discretionary in nature. As such, this Court must exercise this discretionary authority in furtherance of the CCAA's remedial purpose, which should be construed broadly:

> [59] **Judicial discretion must of course be exercised in furtherance**

---

[14] Motion, para. 140.

> **of the *CCAA*'s purposes. The remedial purpose I referred to in the historical overview of the Act is recognized over and over again in the jurisprudence.** To cite one early example:
>
> > The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.
> >
> > (*Elan Corp. v. Comiskey* (1990), 41 O.A.C. 282, at para. 57, *per* Doherty J.A., dissenting)
>
> [60] **Judicial decision making under the *CCAA* takes many forms. A court must first of all provide the conditions under which the debtor can attempt to reorganize. This can be achieved by staying enforcement actions by creditors to allow the debtor's business to continue, preserving the *status quo* while the debtor plans the compromise or arrangement to be presented to creditors, and supervising the process and advancing it to the point where it can be determined whether it will succeed** (see, e.g., *Chef Ready Foods Ltd. v. Hongkong Bank of Can.* (1990), 51 B.C.L.R. (2d) 84 (C.A.), at pp. 88-89; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134, at para. 27). In doing so, the court must often be cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors to include employees, directors, shareholders, and even other parties doing business with the insolvent company (see, e.g., *Canadian Airlines Corp., Re*, 84 Alta. L.R. (3d) 9, at para. 144, *per* Paperny J. (as she then was); *Air Canada, Re* (2003), 42 C.B.R. (4th) 173 (Ont. S.C.J.), at para. 3; *Air Canada, Re*, 2003 CanLII 49366 (Ont. S.C.J.), at para. 13, *per* Farley J.; Sarra, *Creditor Rights*, at pp. 181-92 and 217-26). In addition, courts must recognize that on occasion the broader public interest will be engaged by aspects of the reorganization and may be a factor against which the decision of whether to allow a particular action will be weighed (see, e.g., *Canadian Red Cross Society/Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4th) 158 (Ont. S.C.J.), at para. 2, *per* Blair J. (as he then was); Sarra, *Creditor Rights*, at pp. 195-214).[15]

3.2 Mise-en-cause

13. The CCAA court has broad inherent jurisdiction to impose a stay of proceedings that supplements the statutory provisions of Section 11 where it is just and reasonable to do so, including with respect to non-petitioner parties:

> Thus it appears to me that the inherent power of this court to grant stays can be used to supplement s. 11 of the CCAA when it is just and

---

[15] *Century Services Inc. v. Canada (Attorney General)*, [2010] 3 SCR 379, 2010 SCC 60, paras. 59-60 **(Tab 3)**.

> reasonable to do so.[16] [Emphasis added]

14. Third-party stays have been approved in numerous CCAA proceedings where the third parties were partnerships or persons affiliated or related to the petitioners or part of the same group of entities but did not qualify as "companies" under the CCAA. In cases in which the business operations of group of entities are inextricably intertwined, Courts have found that it would be impossible not to extend the stay to the non-petitioner parties without affecting the petitioner' business as a whole.[17]

15. These principles were recently restated by Justice Newbould in the matter of *4519922 Canada Inc.*:

> I am satisfied that if the stay against the applicant contained in the Initial Order is maintained, it should extend to CLCA and the outstanding Castor litigation. **A CCAA court may exercise its jurisdiction to extend protection by way of the stay of proceedings to a partnership related to an applicant where it is just and reasonable or just and convenient to do so. The courts have held that this relief is appropriate where the operations of a debtor company are so intertwined with those of a partner or limited partnership in question that not extending the stay would significantly impair the effectiveness of a stay in respect of the debtor company.** See *Re Prizm Income Fund* (2011), 75 C.B.R. (5th) 213 per Morawetz J. **The stay is not granted under section 11 of the CCAA but rather under the court's inherent jurisdiction.** It has its genesis in *Re Lehndorff General Partner Ltd*. (1993), 17 C.B.R. (3d) 24 and has been followed in several cases, including *Canwest Publishing Inc*. (2010) 63 C.B.R. (5th) 115 per Pepall J. (as she then was) and *Re Calpine Energy Canada Ltd*. (2006), 19 C.B.R. (5th) 187 per Romaine J.[18] [Emphasis added]

16. In light of the foregoing principles, the Petitioners respectfully submit that the stay of proceedings requested in the draft Initial Order, including the stay relating to the Mise-en-cause, is appropriate and consistent with the purpose of the CCAA.

3.3 Resignation of General Partner

17. Section 16.3 of the Amended and Restated Limited Partnership Agreement in respect of Bloom Lake LP states as follows:

> In agreeing to be bound by this Agreement, the General Partner shall be deemed to have resigned as General Partner upon its bankruptcy, insolvency, dissolution or winding-up, or upon the institution of any action of proceeding to that effect that is not contested by the General Partner

---

16 *Lehndorff General Partner Ltd., Re*, 1993 CarswellOnt 183 (Ont. S.C.), para. 16 **(Tab 4)**.

17 See: *Re iMarketing Solutions Group*, 2013 ONSC 2223, para. 15 **(Tab 5)**; *Homburg Invest Inc. (Arrangement relatif à)*, 2011 QCCS 4989, para. 9 **(Tab 6)**; *White Birch Paper Holding Company (Arrangement relatif à)*, 2010 QCCS 764, paras. 8, 9, 100-102 **(Tab 7)**; *AbitibiBowater inc. (Arrangement relatif à)*, 2009 QCCS 6459, para. 10 **(Tab 8)**; *Lehndorff General Partner Ltd., Re*, *supra*, para. 21 (Tab 4).

18 *Re 4519922 Canada Inc.*, 2015 ONSC 124, para. 37 **(Tab 9)**.

> in good faith, upon the appointment of a trustee in bankruptcy, a receiver or a receiver-manager to administer its affairs, but such resignation shall only take effect on the earlier of the following dates, at which time the General Partner shall cease to be the General Partner:
>
> (a) the date on which a new General Partner is appointed for the Partnership; or
>
> (b) sixty (60) days after a notice of the occurrence of such an event or of such an appointment has been given to the Limited Partners.

18. Paragraph 19 of the draft Initial Order that the Petitioners have provided to the Court in respect of this Motion contains language confirming that the stay of proceedings provided for by section 11.02(1) of the CCAA extends to stay any deemed resignation of Bloom Lake GP as general partner of the Bloom Lake LP.

19. While we are not aware of any law on this point in respect of partnerships, the deemed resignation provision is similar to the provisions replacing operators of oil and gas properties upon the insolvency thereof, which are found in the Canadian Association of Petroleum Landman (CAPL) Operating Procedures which govern almost all oil and gas operations in the Province of Alberta. The relevant provisions in the 1981 CAPL Operating Procedure provide as follows:

> **202 Replacement of Operator**
>
> (a) The Operator shall be replaced immediately and another Operator appointed pursuant to Clause 206, in any one of the following circumstances:
>
> > (i) If the Operator becomes bankrupt or insolvent or commits or suffers any act of bankruptcy or insolvency, or makes any assignment for the benefit of creditors, or causes any judgment to be registered against its participating interest.
> >
> > (ii) If the Operator assigns or purports or attempts to assign its general powers and responsibilities of supervision and management as Operator hereunder.
>
> **206 Appointment of New Operator**
>
> (a) If an Operator resigns or is to be replaced, an Operator shall be appointed by the affirmative vote of two (2) or more parties representing a majority of the participating interests, provided if there are only two (2) Joint-Operators to this Operating Procedure and the Operator that resigned or is to be replaced is one (1) of the Joint-Operators, then, notwithstanding the foregoing, **the other Joint-Operator shall have the right to become the Operator**.
>
> (b) No party shall be appointed Operator hereunder unless it has given its written consent to the appointment; provided that if the parties fail to appoint a replacing Operator or if any appointed Operator fails to carry out its duties hereunder, the party having the greatest participating

> interest shall act as Operator pro tem, with the right, should a similar situation re-occur after a new Operator has been appointed, to require the party having the next greatest participating interest to act as Operator pro tem and so on as occasion demands.
>
> (c) No provision of this Article shall be construed to re-appoint as next-succeeding Operator an Operator who has been replaced under Clause 202, except with the unanimous consent of the parties.
>
> (d) Except as provided in Subclause (a) of Clause 202 (**in which case the Operator shall be replaced immediately**), every replacement of Operator shall take effect at eight (8:00) o'clock a.m. on the first (1st) day of the calendar month following the expiration of any period of notice effecting a change of Operator, notwithstanding anything hereinbefore contained. [Emphasis added]

20. In *Norcen Energy Resources Ltd.* v. *Oakwood Petroleums Ltd.*,[19] upon Oakwood's CCAA filing, Norcen argued that the provisions of the CAPL Operating Procedure were engaged and Oakwood was either automatically removed as operator or was liable to be removed. The Court reviewed the CAPL provisions set out above and determined that the stay of proceedings authorized by section 11 of the CCAA (now section 11.02) should be interpreted broadly and, accordingly, Norcen was stayed from taking action to remove Oakwood as operator of the oil and gas properties in question.

21. Likewise, the position of the Petitioners and the Mise-en-cause is that Article 16.3 requires certain steps to be taken to effect the resignation and replacement of Bloom Lake GP, including the appointment of a new general partner.

    Given that the Petitioners, through CQIM, own approximately 83% of the limited partnership units of Bloom Lake LP[20] and, consequently, control the appointment of any replacement general partner, that resignation and replacement of Bloom Lake GP would cause significant disruption to the *status quo* and to the Petitioners' restructuring efforts, and that the case law out of Alberta in similar situations supports staying the automatic resignation of Bloom Lake GP, any automatic resignation and replacement of the general partner is properly stayed by the stay of proceedings sought in this matter.

4. CREATION OF CHARGES AND ANCILLARY RELIEF

22. As will be further discussed below, this Court has statutory and inherent authority to grant the proposed D&O Charge (s. 11.51 CCAA) and Administrative Charge (s. 11.52 CCAA) (collectively, the "**Charges**"). In order to grant the Charges, this Court must be satisfied (i) that they are appropriate in the circumstances and (ii) that notice has been given to secured creditors who are likely to be affected by the Charges.[21]

23. A "secured creditor" in the CCAA is defined as a:

---

19 *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.*, 1988 CanLII 3560 (AB QB) **(Tab 10)**.

20 Motion, para. 107.

21 CCAA, ss. 11.51, 11.52.

> holder of a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, all or any property of a debtor company as security for indebtedness of the debtor company, or a holder of any bond of a debtor company secured by a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, or a trust in respect of, all or any property of the debtor company, whether the holder or beneficiary is resident or domiciled within or outside Canada, and a trustee under any trust deed or other instrument securing any of those bonds shall be deemed to be a secured creditor for all purposes of the Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds.[22]

24. The secured creditors likely to be affected by the Charges include:

- Key Equipment Finance Inc.;[23]
- The Bank of Nova Scotia;[24]
- Cole Taylor Equipment Finance, LLC;[25]
- The Bank of the West;[26]
- BBVA Compass Financial Corporation;[27]
- SunTrust Equipment Finance & Leasing Corp.;[28]
- Signature Financial LLC;[29]
- The Bank of Montreal;[30]
- PPSA Creditors;[31]
- RPMRR Creditors;[32]
- Holders of Legal Hypothecs.[33]

---

22 *Id.*, s. 2.

23 Motion, paras. 148 to 149 and Exhibit R-14.

24 Motion, para. 149

25 *Id.*

26 *Id.*

27 *Id.*

28 *Id.*

29 *Id.*

30 Motion, paras. 189 to 191.

31 Motion, paras. 186 and Exhibits R-17, R-19 and R-20.

32 Motion, para. 186 b) and Exhibit R-18.

25. At the stage of the presentation of the Motion, the rights of these creditors will not be affected since a request to prime these charges for the benefit of the beneficiaries of the Charges will not be presented until the Comeback Hearing.

26. Moreover, the draft Initial Order provides that any interested person may apply to this Court to vary or rescind the Initial Order or to seek other relief at the comeback hearing.[34]

4.1 Protection of Directors and Officers[35]

27. Pursuant to section 11.51 of the CCAA, this Court has specific authority to grant a charge to the directors and officers of a debtor company as security for the indemnity provided by the company in respect of certain statutory obligations, such as employment and environment-related statutory liabilities:

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

28. This provision codifies the earlier practice of CCAA courts to grant charges protecting directors and officers against liabilities that they could incur during the restructuring and reorganization of a debtor company.[36] As this Court expressed in *Re JetsGo Corporation*,[37] such charges reflect the specific risks to which these individuals are exposed in the event of an insolvency:

---

33 Motion, para. 156 and Exhibit R-15.

34 Draft Initial Order, para. 64 (Exhibit R-2).

35 Draft Initial Order, paras. 30 to 32 (Exhibit R-2).

36 *General Publishing Ltd. (Re) (In Bankruptcy)*, 2003 CanLII 7787 (ON SC), para. 6 **(Tab 11)**.

37 *Jetsgo Corp. (Bankruptcy), Re*, 2005 CanLII 13012 (QC CS), para. 42 **(Tab 12)**.

> [42] **The purpose of creating the D&O Charge is to protect the Directors and Officers against liabilities that they could incur during the restructuring and reorganization of the company.** As Pamela L.J. Huff and Line A. Rogers write in the Commercial Insolvency Reporter:
>
> > « **Thus, against the backdrop of a potential business failure, a CCAA restructuring creates new risks and potential liabilities for another group of critical participants in an insolvency : the directors and officers of a debtor corporation. It has become standard to include in an initial order a charge securing the indemnity granted by the debtor to directors and senior corporate officers (including a Chief Restructuring Officer, who may be court-appointed) against liabilities that emerge during and, sometimes, prior to, a CCAA filing.** »[38] [Emphasis added; references omitted]

29. The main purpose of directors' and officers' charges is to maintain the directors and officers in place during the restructuring and reorganization in order to avoid destabilization:

> [48] **The purpose of such a charge is to keep the directors and officers in place during the restructuring by providing them with protection against liabilities they could incur during the restructuring**: *Re General Publishing Co.* Retaining the current directors and officers of the applicants would avoid destabilization and would assist in the restructuring. **The proposed charge would enable the applicants to keep the experienced board of directors supported by experienced senior management.** The proposed Monitor believes that the charge is required and is reasonable in the circumstances and also observes that it will not cover all of the directors' and officers' liabilities in the worst case scenario. In all of these circumstances, I approved the request.[39] [Emphasis added; reference omitted]

30. Case law has recognized the importance of retaining experienced boards of directors and senior management during a company's reorganization.[40]

31. In the present case, the D&O Charge is essential to the successful restructuring or liquidation of the Petitioners, which would not be possible without the continued participation of the Petitioners' experienced board of directors and senior management.[41]

32. The amount of the D&O Charge ($3.5M)[42] will not extend to claims that are covered by

---

38 *Id.*, para. 42.

39 *Canwest Global Communications Corp. (Re)*, 2009 CanLII 55114 (ON SC), para. 48 **(Tab 13)**.

40 *Id.*; *Canwest Publishing Inc.*, 2010 ONSC 222, paras. 54, 56-57 **(Tab 14)**.

41 Motion, paras. 238 to 248.

42 Motion, para. 246.

the D&O Insurance.[43]

4.2 Administration Charge[44]

33. Section 11.52 of the CCAA also expressly empowers this Court to grant a charge to secure the fees and expenses of professionals engaged by a debtor company in the context of CCAA proceedings:

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

34. In *Re Canwest Publishing,*[45] Justice Pepall proposed the following non-exhaustive list of factors to be considered in approving an administration charge, including:

- the size and complexity of the businesses being restructured;
- the proposed role of the beneficiaries of the charge;
- whether there is an unwarranted duplication of roles;
- whether the quantum of the proposed charge appears to be fair and reasonable;
- whether the position of the secured creditors is likely to be affected by the charge; and
- the position of the Monitor.

35. In *Re Timminco Ltd.*,[46] Justice Morawetz reiterated the importance of protecting

---

43 Motion, para. 247.

44 Draft Initial Order, para. 45 (Exhibit R-2).

45 *Canwest Publishing Inc.*, *supra*, para. 54 (Tab 14).

46 *Timminco Limited (Re)*, 2012 ONSC 506 **(Tab 15)**.

professionals and directors and officers who are participating in the CCAA process:

> [65] There is a clear inter-relationship between the granting of the Administration Charge, the granting of the D&O Charge and extension of protection for the directors and officers for the company's failure to pay the pension contributions.
>
> [66] **In my view, in the absence of the court granting the requested super priority and protection, the objectives of the CCAA would be frustrated. It is not reasonable to expect that professionals will take the risk of not being paid for their services, and that directors and officers will remain if placed in a compromised position should the Timminco Entities continue CCAA proceedings without the requested protection. The outcome of the failure to provide these respective groups with the requested protection would, in my view, result in the overwhelming likelihood that the CCAA proceedings would come to an abrupt halt, followed, in all likelihood, by bankruptcy proceedings.**[47] [Emphasis added]

36. In light of these factors, the Petitioners submit that it is appropriate for this Court to grant the Administration Charge, as per the draft Initial Order.[48]

5. JURISDICTION OF THE COURT TO AUTHORIZE LIMITED PARTNERSHIPS TO DISCLAIM OR RESILIATE AGREEMENTS[49]

37. Section 32 of the CCAA allows a debtor company, on notice and with the approval of the monitor, to disclaim or resiliate any agreement to which it is a party on the day of the issuance of an Initial Order.

38. This right is habitually restated in Initial Orders, such as in the Model Initial Order published by this Honourable Court:[50]

> 28. DECLARES that, to facilitate the orderly restructuring of its business and financial affairs (the "**Restructuring**") but subject to such requirements as are imposed by the CCAA, the Petitioner shall have the right, subject to approval of the Monitor or further order of the Court, to: […]
>
> (e) subject to the provisions of section 32 CCAA, disclaim or resiliate, any of its agreements, contracts or arrangements of any nature whatsoever, with such disclaimers or resiliation to be on such terms as may be agreed between the Petitioner and the relevant party, or failing such agreement, to make provision for the consequences thereof in the Plan; […]

---

47 *Id.*, paras. 65-66.

48 Motion, paras. 232 to 237.

49 Draft Initial Order, para. 33(e) (Exhibit R-2).

50 See para. 28 (e) of the Model Initial Order published by this Honourable Court on the website of the Barreau de Montréal (http://www.barreaudemontreal.qc.ca/en/avocats/SC-comm).

39. There are several CCAA matters in which courts have explicitly authorized limited partnerships to disclaim or resiliate agreements pursuant to section 32 of the CCAA in the context of a CCAA restructuring:

a) In the Second Amended Initial Order rendered by the Honourable Justice Gascon of the Superior Court (as he then was) *In the Matter of the Plan of Compromise or Arrangement of AbitibiBowater Inc. et al.*, the Court made the following declaration:

> [46] DECLARES that, to facilitate the orderly restructuring of their business and financial affairs (the "Restructuring"), **the Petitioners and Partnerships shall have the right**, subject to approval of the Monitor or further order of the Court and to: […]
>
> f) **repudiate such of their agreements, contracts or arrangements of any nature whatsoever, whether oral or written, as they deem appropriate**, on such terms as may be agreed between the Petitioners or Partnerships and the relevant party, or failing such agreement, to make provision for the consequences thereof in the Plan and to negotiate any amended or new agreements or arrangements.[51] [Emphasis added]

For the purposes of the Second Amended Initial Order in the *AbitibiBowater Inc.* matter, the "Partnerships" given the aforementioned right to repudiate contracts were defined at para. 10 as comprising three limited partnerships listed at Schedule "D" thereto.[52]

b) In the Initial Order rendered in the matter of *Cinram International Inc. et al.*, the Honourable Justice Morawetz (as he then was) of the Ontario Superior Court of Justice rendered a similar order:

> 12. THIS COURT ORDERS that **the CCAA Parties shall**, subject to such requirements as are imposed by the CCAA and such covenants as may be contained in the Definitive Documents (as hereinafter defined), **have the right to**: […]
>
> (d) **disclaim such of their arrangements or agreements of any nature whatsoever with whomsoever, whether oral or written, as the CCAA Parties deem appropriate, in accordance with section 32 of the CCAA** and to deal with any claims arising from such disclaimer in the Plan;[53] [Emphasis added]

---

51 *AbitibiBowater inc. (Arrangement relatif à)*, 2009 QCCS 6452, para. 46 f) **(Tab 16)**.

52 *Id.*, para. 10 and Schedule "D".

53 *Cinram International Inc. et al. (Re)* (25 June 2012), Toronto CV12-9767-00CL (Ont. S.C.J.), para. 12 (d) **(Tab 17)**.

For the purposes of the Initial Order in the *Cinram International Inc.* matter, the "CCAA Parties" included, along with the Applicants, the limited partnership Cinram LP.[54]

c) In the Amended and Restated Initial Order in the matter of *Smurfit-Stone Container Canada Inc. et al.*, the Honourable Justice Pepall of the Ontario Superior Court of Justice included a similar order:

> 11. THIS COURT ORDERS that **the Applicants and Partnerships shall**, subject to such covenants as may be contained in the DIP Documents, **have the right to**: […]
>
> (d) **repudiate such of their arrangements or agreements of any nature whatsoever, whether oral or written, as the Applicants or Partnerships deem appropriate** on such terms as may be agreed upon between the relevant Applicant or Partnership and such counter-parties, or failing such agreement, to deal with the consequences thereof in the Plan;[55] [Emphasis added]

For the purposes of the Amended and Restated Initial Order in the *Smurfit-Stone Container Canada Inc.* matter, the "Partnerships" were defined as being two partnerships listed at Schedule "B", who despite not being Applicants, were to enjoy the benefits and protections provided by the Order.[56]

d) In the very recent Initial Order rendered in the matter of *Target Canada Co. et al.*, the Honourable Regional Senior Justice Morawetz of the Ontario Superior Court of Justice provided for the possibility for any of the "Target Canada Entities" to disclaim or resiliate any lease and may issue any other notice of disclaimer or resiliation pursuant to s. 32 of the CCAA.[57] These Target Canada Entities included, *inter alia*, three limited partnerships listed at Schedule "A" of the Initial Order.[58]

e) In the *League Assets Corp.* matter, the Petitioners included 28 limited partnerships, as appears from Schedule "A" to the Initial Order rendered by the Honourable Justice Fitzpatrick of the Supreme Court of British Columbia.[59] This Initial Order provided for the possibility of all of these Petitioners to disclaim their agreements, including the Limited Partnerships.[60]

---

54 *Id.*, para. 3.

55 *Smurfit-Stone Container Canada Inc. et al. (Re)* (26 January 2009), Toronto CV-09-7966-00CL (Ont. S.C.J.), para. 11 (d) **(Tab 18)**.

56 *Id.*, para. 2 and Schedule "B".

57 *Target Canada Co. et al. (Re)* (15 January 2015), Toronto CV-15-10832-00CL (Ont. S.C.J.), paras. 14-15 **(Tab 19)**.

58 *Id.*, preamble and Schedule "A".

59 *League Assets Corp. (Re)* (25 October 2013), Vancouver S-137743 (B.C. Supr. Ct.), Schedule "A" **(Tab 20)**.

60 *Id.*, paras. 14-15.

40. As appears from the foregoing, there is ample precedent for the issuance by the Court of an order allowing limited partnerships to disclaim or resiliate agreements in the context of CCAA restructurings involving related companies.

6. AUTHORIZATION PURSUANT TO CANADA'S ANTI-SPAM LEGISLATION[61]

41. Since the entry into force of Canada's Anti-Spam Legislation ("**CASL**")[62] on July 1, 2014, some concerns have been raised regarding whether the distribution of email notifications in an insolvency proceeding may violate CASL.

42. In a recent decision rendered by Justice Newbould on September 11, 2014,[63] a provision was inserted in a sale procedure order to address these concerns. The provision reads as follows:

> THIS COURT ORDERS that, pursuant to clause 3(c)(i) of the *Electronic Commerce Protection Regulations,* made under *An Act to Promote the Efficiency and Adaptability of the Canadian Economy by Regulating Certain Activities that Discourage Reliance on Electronic Means of Carrying out Commercial Activities, and to Amend the Canadian Radio-Television and Telecommunications Commission Act, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act,* S.C. 2010, c. 23, the Applicant and the Monitor are authorized and permitted to send, or cause to permit to be sent, commercial electronic messages to an electronic address of prospective purchasers or bidders and to their advisors but only to the extent desirable or required to provide information with respect to the Sale Process.

43. The Petitioners respectfully submit that it is appropriate to include a similar provision in the Initial Order[64] which will authorize the CCAA Parties and the Proposed Monitor to distribute commercial electronic messages to prospective purchasers or bidders and to their advisors.

7. SALE AND INVESTOR SOLICITATION PROCESS (SISP)

44. Section 36 of the CCAA expressly permits the sale of substantially all of the debtor's assets even in the absence of the presentation and vote upon a plan of arrangement:

> **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.

---

61 Draft Initial Order, para. 38 (Exhibit R-2).

62 *An Act to Promote the Efficiency and Adaptability of the Canadian Economy by Regulating Certain Activities that Discourage Reliance on Electronic Means of Carrying out Commercial Activities, and to Amend the Canadian Radio-television and Telecommunications Commission Act, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act*, SC 2010, c 23.

63 *Martin Ross Group inc. (Re)* (11 September 2014), Toronto CV-14-10655-00CL (Ont. S.C.J.), para. 6 **(Tab 21)**.

64 Draft Initial Order, para. 38 (Exhibit R-2).

> 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.

45. Therefore, the Petitioners submit that the fact that a sale and investor solicitation process is anticipated at the time of the Initial Order does not mean that the Initial Order should not be granted.[65]

THE WHOLE RESPECTFULLY SUBMITTED.

Montréal, January 27, 2014

BLAKE, CASSELS & GRAYDON LLP
Attorneys for the Petitioners

8438636.8

---

65 *First Leaside Wealth Management Inc. (Re)*, 2012 ONSC 1299, paras. 32-37 **(Tab 22)**; *Brainhunter Inc. (Re)*, 2009 CanLII 67659 (ON SC), para. 17 **(Tab 23)**.