

**UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

In re:

IMV Inc., *et al.*,

Debtors in a Foreign Proceeding.<sup>1</sup>

Chapter 15

Case No. 23-10589 (KBO)

(Joint Administration Requested)

Re: D.I. 4

**DECLARATION OF ALAIN N. TARDIF IN SUPPORT OF THE DEBTORS' VERIFIED  
PETITION FOR (I) RECOGNITION OF FOREIGN MAIN PROCEEDING,  
(II) RECOGNITION OF FOREIGN REPRESENTATIVE, (III) RECOGNITION OF  
AMENDED AND RESTATED INITIAL ORDER, AND (IV) RELATED RELIEF**

I, Alain N. Tardif, pursuant to 28 U.S.C. § 1746, hereby declare under penalty of perjury under the law of the United States as follows:

1. I am a Partner of the Canadian law firm of McCarthy Tétrault LLP located at 1000 de la Gauchetière Street West, Suite MZ400, Montreal, Quebec, in Canada, where my broad-ranging practice focuses on restructuring and insolvency matters. I am counsel to IMV Inc. ("IMV" or the "Foreign Representative"), which is the duly appointed foreign representative of the above captioned debtors (the "Debtors"), as well as the Debtors in Canadian proceedings (the "Canadian Proceeding") commenced under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended (the "CCAA"), pending before the Supreme Court of Nova Scotia (the "Canadian Court"). I submit this declaration in connection with the relief the Foreign Representative is requesting in these chapter 15 cases and to aid the Court in understanding Canadian law pursuant to the CCAA. All facts set forth in this Declaration are based on: (a) my

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<sup>1</sup> The Debtors in these chapter 15 proceedings, together with the last four digits of their business identification numbers, are: IMV Inc. (6991); IMV USA Inc. (4184) ("IMV USA"); and Immunovaccine Technologies Inc. (6772) ("IVT"). The location of the Debtors' headquarters and the Debtors' foreign representative is: 130 Eileen Stubbs Avenue, Suite 19, Dartmouth, Nova Scotia B3B 2C4.

knowledge; (b) my review of relevant documents; and/or (c) my opinion based upon my experience and knowledge of the Debtors' operations. If I were called upon to testify, I could and would testify competently to the facts set forth herein.

2. I earned my LL.B from the Université de Montréal in 1989 and my BCL from the University of British Columbia in 1991. I was admitted to the Québec Bar in 1992.

3. I have extensive experience in the field of Canadian corporate reorganization and insolvency law, advising debtor corporations and large corporate groups, lenders, bondholders and other creditors, court-appointed officers (e.g., CCAA monitors), investors, and acquirers in CCAA proceedings, receivership, bankruptcy, as well as under federal and provincial corporate and/or insolvency legislation in both Canadian and international contexts. My expertise in Canadian restructuring law is recognized by a variety of different organizations, including Chambers Canada where I am considered a "Leading Lawyer" in the restructuring and insolvency practice area.

## **I. The Canadian Proceeding**

4. As is explained in greater detail in the *Declaration of Andrew Hall in Support of the Debtors' Verified Petition for (I) Recognition of Foreign Main Proceeding, (II) Recognition of Foreign Representative, (III) Recognition of Amended And Restated Initial Order, and (IV) Related Relief* (the "Hall Declaration")<sup>2</sup>, on April 28, 2023, the Debtors commended the Canadian Proceeding with the Canadian Court pursuant to an application under the CCAA. On May 1, 2023, the Canadian Court entered an initial order (the "Initial Order") and on May 5, 2023, the Canadian Court entered an amended and restated Initial Order (the "Amended and Restated Initial Order"). Certified copies of both the Initial Order and the Amended and Restated Initial Order

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<sup>2</sup> Capitalized terms used but not defined herein shall have the meaning ascribed to them in the Hall Declaration.

are attached to each of the Debtors' chapter 15 petitions, and the Amended and Restated Initial Order is attached as Exhibit 1 to the Provisional Relief Order.

5. Among other things, the Amended and Restated Initial Order:
  - (a) confirms the appointment of IMV as the Foreign Representative of the Debtors and its authority to apply for recognition of the Canadian Proceeding under chapter 15 of the Bankruptcy Code;
  - (b) declares that Nova Scotia, Canada is the Debtors' "*centre of main interest*";
  - (c) confirms the appointment of the Monitor;
  - (d) provides for a stay of proceedings or the exercise of rights or remedies against the Debtors and their Directors and Officers from the May 5, 2023 through and including July 17, 2023 (the "Stay Period");
  - (e) provides that during the Stay Period, rights and remedies, including those that would be deemed to occur upon the filing of the Canadian Proceeding by the Debtors, against the Debtors or affecting their Business or Property are stayed and suspended absent the written consent of the Debtors and Monitor or leave of the Canadian Court;
  - (f) prohibits parties from discontinuing, failing to renew per the same terms and conditions, failing to honor, alter, interfere with, repudiate, terminate, or cease to perform any right in favor of or held by the Debtors;
  - (g) prohibits parties with written or oral agreements with the Debtors for the supply of good or services from discontinuing, failing to renew per the same terms and conditions, altering, interfering with, or terminating the supply of such goods or services as may be required by the Debtors;
  - (h) approves a priority charge on the Debtors' assets in favor of the Debtors' counsel, the Monitor, and the Monitor's counsel in the amount of \$750,000;
  - (i) approves a priority charge on the Debtors' assets in favor of the Debtors' Directors and Officers in the amount of \$275,000;
  - (j) approves the Debtors' Key Employee Retention Plan (the "KERP") and a priority charge on the Debtors' assets in favor of the employees that are referred to in the KERP in the amount of \$575,000; and
  - (k) approves the sale investment solicitation process under the CCAA.

6. The Hall Declaration provides a detailed account of the Canadian Proceeding, the relief granted therein, and the relief sought in these chapter 15 cases.

## **II. Overview of the CCAA Restructuring Process**

7. The CCAA provides for a court-supervised reorganization procedure designed to enable financially distressed companies to avoid foreclosure or seizure of assets while maximizing the company's value as a going concern for the benefit of creditors and other parties in interest.

8. A CCAA proceeding is generally a voluntary insolvency proceeding in which a debtor reorganizes or sometimes liquidates its business and distributes proceeds to creditors pursuant to a plan and under court supervision. The debtor's assets and affairs are subject to the supervision of a court-appointed officer and a Canadian court during the pendency of a CCAA proceeding.

9. In a CCAA proceeding, absent exceptional circumstances, a debtor's management and board of directors remain in place, and the board maintains its power under Canadian law to approve significant actions, including disposing of important assets, borrowing significant amounts, or changing corporate structures, subject to oversight by a court-appointed monitor (discussed below) and approval of the court.

10. The CCAA process begins when a company files an initial application—often on an *ex parte* basis—in the court in the jurisdiction where the company's headquarters or principal place of business is situated for protection under the CCAA. The initial application must, *inter alia*, be accompanied by: (a) projected weekly cash flow statements; (b) a statement regarding the preparation of the cash-flow statements; and (c) copies of all audited or unaudited financial statements prepared during the year prior to the application. *See* CCAA at 10(2).

11. Upon the filing of the initial application, the court may enter an order staying all proceedings and actions against the debtor company and its property as well as against its directors and officers for an initial period that does not exceed 10 days. *See* CCAA at 11.02(1). This period may subsequently, from time to time, be extended by the CCAA court for the period of time required to implement a CCAA restructuring. The initial order and any subsequent amendment and restatement thereof, may also include, among other things, (a) authority to disclaim certain contracts; (b) a prohibition on the payment of pre-filing obligations, subject to certain permitted exceptions; (c) authority to pay any outstanding wages, salaries, employee and pension benefits, as well as other entitlements and expenses; (d) an order to pay certain taxes; and (e) a prohibition on sales outside the ordinary course of business without court approval. *See* CCAA at 11.09 (2).

12. Upon the entering of an initial order granting the initial application, all actions against the debtor and its assets are stayed, wherever located (similar to the Bankruptcy Code's automatic stay). The stay is first granted for a maximum period of 10 days. The relief granted by the court within such 10-day timeframe is required to be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business. The initial stay period is typically extended where the debtor can show it continues to act with good faith and due diligence. There is no limit on the number or duration of these extensions of the stay. As of the date hereof, the Stay Period is in effect until and including July 17, 2023.

13. Upon the commencement of a CCAA proceeding, the court will appoint a qualified monitor, who functions as an independent court officer and observer of the CCAA proceeding and the debtor's business and (i) monitors the company's ongoing operations, (ii) reports to the court on any major events affecting the company, (iii) notifies the company's creditors and, if applicable, shareholders of any meetings and tabulates votes at these meetings, if held, (iv) assists with

preparing, filing, and holding meetings for voting on the plan of arrangement, (v) approves the disclaimer of contracts and leases, (vi) may prepare reports in conjunction with any interlocutory motions by the company or other stakeholders, and (vii) prepares a report on the plan of arrangement, if one is filed, and on any sale transaction involving an insolvent debtor's assets conducted out of the ordinary course. The monitor acts as the "eyes and ears of the court." Consent of the monitor is generally not required for the debtor to manage its business, including the sale of assets in the ordinary course, but the monitor may request that the court enjoin any actions that may prove harmful to the debtor and/or its creditors. Though the monitor need not formally approve significant transactions such as asset sales outside of the ordinary course, court approval is generally required for such transactions and the court gives weight to the monitor's recommendations concerning such transactions.

14. As is the case in the United States chapter 11 process, the company will usually continue to operate during the CCAA proceedings, and it may also avail itself of restructuring measures (such as the disclaimer of onerous executory contracts) with a view to enhance the prospects of bringing forward a successful Plan of Arrangement or other restructuring transaction.

15. In a CCAA proceeding, subject to limited exceptions, clauses triggering termination rights upon the debtor's commencement of an insolvency proceeding are not enforceable, so contract counterparties may not terminate contracts solely by virtue of the commencement of the CCAA proceeding.

16. In a CCAA proceeding, on or after the day on which the CCAA proceedings commence, the debtor may disclaim or resiliate (*i.e.*, cancel) any agreement (including leases) to which it is a party by giving a notice of at least 30 days (the "Disclaimer Notice Period") to disclaim or resiliate the agreement.

17. In the case of lease agreements, the CCAA requires that the debtor pay post-filing rent due under the lease agreement during the Disclaimer Notice Period and until the lease agreement is terminated. In addition, the monitor must approve the proposed disclaimer or resiliation.

18. An agreement as to which a disclaimer notice has been sent is automatically disclaimed or resiliated—which has the legal effect of terminating the lease agreement—at the expiration of the Disclaimer Notice Period unless within 15 days after the day on which the notice was given, the counterparty to the agreement applies to the Court for an order that the agreement is not to be disclaimed or resiliated. Upon such an application, the counterparty is entitled to a hearing before the Canadian court on its objection to the debtor’s disclaimer of the agreement.

19. A counterparty to the agreement who suffers a loss in relation to the termination resulting from disclaimer or resiliation is considered to have a provable claim. Upon disclaimer, such a claim is evaluated to determine the damage caused to the counterparty. In the case of a landlord damaged by disclaimer of a lease agreement, the damage claim could, for example, be evaluated based upon the time necessary for the landlord to find a replacement tenant or under rules of the *Bankruptcy and Insolvency Act*, Canada’s other insolvency statute.

20. Upon determination of the value of the counterparty’s claim, the claim amount is included in the unsecured claims to be paid in accordance with the plan of arrangement sanctioned by the Canadian court, if one is filed.

21. For a plan of arrangement to be binding on each class of creditors, a majority of the proven creditors in that class, by number, together with two-thirds (2/3) of the proven creditors in that class, by dollar value, may approve of said plan presented to them. If a class of creditors approves the plan, it is binding on all creditors within the class, subject to the court’s approval of

the plan. If all of the classes of creditors approve the plan, the court must then sanction the plan as a final step. Upon court approval, the company continues forward as outlined under the plan until it has satisfied the requirements under the plan.

22. A plan of arrangement is one of the possible outcomes of a process under the CCAA. A variety of other outcomes are possible. These include notably a sale of assets or shares, or other restructuring transaction, effected with court approval but in the absence of a plan of arrangement.

23. Throughout a CCAA proceeding, the court retains broad discretion to “make any order that it considers appropriate in the circumstances.”

### **III. Sales under the CCAA**

24. Prior to 2009, there was an ongoing debate over whether creditor protection under the CCAA was appropriate to allow for an orderly liquidation of a debtor company. In 2009, the CCAA was amended to include, *inter alia*, statutory rights in favor of debtor companies to sell or otherwise dispose of their assets outside of the ordinary course of business and outside of a CCAA plan. Accordingly, since then, Canadian courts have come to accept that the business and assets of an insolvent company can be sold under the CCAA free and clear of any lien, security, charge or other restriction, without the need to file a CCAA plan. The CCAA now allows a debtor to dispose of all or substantially all of its business and assets outside of the ordinary course of business without the formal approval of its creditors, provided it obtains prior authorization from the court. In deciding whether to authorize the proposed sale of assets, the CCAA stipulates that the Canadian court is to consider, among other things:

- (a) whether the process leading to the proposed sale or disposition was reasonable under the circumstances;
- (b) whether the monitor has approved the process leading to the proposed sale or disposition;



- (c) whether the monitor filed with the Canadian court a report stating that in its 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.

25. These criteria are largely based on the principles which were previously enunciated by the Ontario Court of Appeal in the *Soundair* matter<sup>3</sup>, in which the court listed the following non-exhaustive criteria to examine in order to determine whether a sale of assets of an insolvent debtor should be approved:

- (a) whether sufficient effort has been made to obtain the best price and that the debtor has not acted improvidently;
- (b) the interests of all parties;
- (c) the efficacy and integrity of the process by which offers have been obtained; and
- (d) whether there has been unfairness in the working out of the process.

26. If the required test is met, the court will normally issue an approval and vesting order authorizing the transfer of the assets on a free and clear basis (other than assumed/permitted encumbrances) or a reverse vesting order authorizing the transfer to a residual corporation of all the unwanted assets, undertakings and liabilities and vesting the shares of the debtor to a purchaser on a free and clear basis. In the case of a reverse vesting order, the consideration received is paid to the residual corporation. The order will also provide that creditor claims will have the same priority against the proceeds of the transaction that they had against the assets, prior to the sale.

27. It should be noted that court authorization will be granted only if the Canadian court is satisfied that the company can and will make the payments for any unpaid wages or pension plan contributions that would have been required if the court had approved a proposal or a plan of

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<sup>3</sup> *Royal Bank of Canada v Soundair Corp.* (1991), 4 O.R. (3d) 1 (C.A.).

arrangement and compromise, as applicable. It should also be noted that if the sale transaction ultimately presented to the court for approval is with a related party, certain additional requirements must be met.

28. While, as mentioned, a sale of the business or assets of a debtor company does not require the formal approval of its creditors, the CCAA require that a notice of application to the Canadian court for the approval of the transaction be given by the debtor to all of its secured creditors who are likely to be affected by the proposed sale or disposition.

#### **IV. The Canadian Proceeding is a Foreign Main Proceeding**

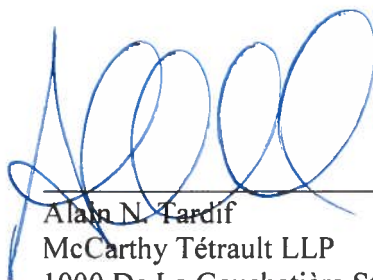
29. To ensure the effective and economic administration of the Debtors' restructuring efforts, I believe that the Debtors require the protection afforded to foreign debtors pursuant to chapter 15 of the Bankruptcy Code in order to prevent disruption of business and recognize the legal effect of the Canadian Proceeding in the United States.

30. To the best of my information and belief, the Canadian Proceeding is a collective judicial proceeding under Canadian law relating to the adjustment of debt of the Debtors in which the purpose is a corporate restructuring.

31. I believe, to the best of my information and belief, and as identified in the Hall Declaration, filed contemporaneously herewith, other than these chapter 15 cases, the Canadian Proceeding is the only proceeding related to the adjustment of debts pending for the Debtors and, therefore, is the only "foreign proceeding" with respect to the Debtors within the meaning of section 101(23) of the Bankruptcy Code.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my knowledge, information, and belief.

Dated: May 5, 2023



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