

**SUPREME COURT OF NOVA SCOTIA**

**IN THE MATTER OF:**      **Application by IMV Inc., Immunovaccine Technologies Inc. and IMV USA Inc. (the “Applicants”), for relief under the *Companies’ Creditors Arrangement Act***

**FACTUM OF THE APPLICANTS IN SUPPORT OF THE ISSUANCE OF AN AMENDED AND RESTATED INITIAL ORDER AND A CLAIMS PROCESS ORDER**

To the Honourable Justice John P. Bodurtha, the Applicants respectfully submit:

**PART I – OVERVIEW**

1. The Debtors / Applicants IMV Inc., Immunovaccine Technologies Inc. (“**IVT**”) and IMV USA Inc. (“**IMV USA**”) and collectively with IMV Inc. and IVT, “**IMV**” or the “**Applicants**”) seek additional relief under the *Companies’ Creditors Arrangement Act* (the “**CCAA**”).<sup>1</sup>
2. On May 1<sup>st</sup>, 2023, the Court issued an initial order (the “**Initial Order**”) which granted, among other things :
  - (i) a stay of proceedings, staying all proceedings and remedies taken or that might be taken in respect of the Applicants and their respective Directors and Officers (as defined below), or any of their property, except as otherwise set forth in the Initial Order or as otherwise permitted by law (the “**Stay of proceedings**”) for an initial period of ten (10) days in accordance with the CCAA (the “**Stay Period**”);
  - (ii) the appointment of FTI Canada Consulting Inc. (“**FTI**” or the “**Proposed Monitor**”) as monitor of the Applicants in these proceedings (the “**Monitor**”); and
  - (iii) an Administration Charge (as defined below) of \$350,000 and a Directors’ Charge (as defined below) of \$450,000 to cover the potential exposure of the beneficiaries of such charges for the initial Stay Period.

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<sup>1</sup> RSC 1985, c C-36, as amended.

3. In furtherance of the objectives of the CCAA, the Applicants are seeking, the following:
- (i) an Amended and Restated Initial Order which, among other things would, if granted, be:
    - (a) extending the Stay of proceedings until and including July 17, 2023;
    - (b) increasing the Administration Charge to \$750,000 and reducing the Directors' Charge to \$275,000 and declaring that such charges have priority over all other charges and security interests, including, without limitation, over the claims of the federal and provincial governments that can be secured by a deemed trust;
    - (c) authorizing the Applicants, with the consent of the Monitor, to pay certain pre-filing amounts owed to suppliers which they deem critical to their business;
    - (d) approving a sale and investment solicitation process (the "**SISP**") to solicit offers for a broad range of executable transactions in respect of the business and/or assets of the Applicants;
    - (e) approving a key employee retention plan (the "**KERP**") and related KERP Charge (as defined below); and
    - (f) an order declaring that the schedules to the KERP Agreement (as defined hereinafter) should be kept strictly confidential and filed under seal.
  - (ii) a claims process order (the "**Claims Process Order**"), to determine and adjudicate claims against the Applicants and the Applicants' present and former, *de jure* and *de facto*, directors and officers (the "**Directors and Officers**"), which *inter alia* provides for a reverse claims process for the determination and adjudication of the employee claims.

## PART II – THE FACTS

4. The facts are more fully set out in the Hall Affidavit<sup>2</sup> and the Hall Supplemental Affidavit<sup>3</sup> of Andrew Hall sworn April 28, 2023 (the “**Hall Affidavit**”), and the Affidavit of Andrew Hall sworn May 3, 2023 (the “**Hall Supplemental Affidavit**”). Capitalized terms used herein and not otherwise defined shall have the meanings associated to them in the Hall Affidavit, unless the context shall otherwise require. Dollar amounts are given in Canadian dollars unless otherwise specified.

## PART III – ISSUES

5. The issues before this Court, as addressed below, are whether:
  - (i) the Court should extend the Stay Period until July 17, 2023;
  - (ii) the Court should increase the quantum of the Administration Charge to \$750,000 and grant same a super-priority;
  - (iii) the Court should reduce the quantum of the Directors’ Charge to \$275,000 and grant same a super-priority;
  - (iv) the Applicants should be authorized to pay certain critical suppliers deemed critical to their business;
  - (v) the KERP should be approved and the KERP Charge should be granted;
  - (vi) the SISP Procedures should be approved;
  - (vii) the Claims Process should be approved; and
  - (viii) the schedules to the KERP should be kept strictly confidential and filed under seal.

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<sup>2</sup> Affidavit of Andrew Hall sworn April 28, 2023 [*Hall Affidavit*].

<sup>3</sup> Affidavit of Andrew Hall sworn May 3, 2023 [*Hall Supplemental Affidavit*].

## PART IV – THE LAW

### A. The Court Should Grant the Amended and Restated Initial Order

#### (i) The Court Should Extend the Stay Period Until July 17, 2023

6. On May 1<sup>st</sup>, 2023, the Court granted a Stay of proceedings in favour of IMV and its Directors and Officers until and including May 5, 2023. The Applicants now seek the extension of such Stay Period until and including July 17, 2023.
7. Subsection 11.02(2) of the CCAA sets out the criteria for extending a stay order, namely that it would be appropriate to do so and that the applicant or debtor company is acting, or has acted in good faith and with due diligence.<sup>4</sup>
8. It is appropriate to grant an extension where the debtor company has adopted measures to further the purpose of the CCAA, namely to restructure the debtor company for the benefit of its stakeholders. These measures can include the conduct of a SISF, where the SISF is the most efficient way to maximize the value for stakeholders.<sup>5</sup>
9. With respect to the good faith and due diligence requirements at section 11.02 (3), they refer to factors such as the “*observance of reasonable commercial standards of fair dealings in the proceedings, the absence of an intent to defraud and a duty of honesty to the court and to the stakeholders directly affected by the CCAA process.*”<sup>6</sup>
10. In the present case, in the short initial Stay Period, the Applicants have, amongst other activities:

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<sup>4</sup> CCAA, s [11.02](#).

<sup>5</sup> *North American Tungsten Corporation Ltd (Re)*, [2015 BCSC 1376](#) at [paras 26-28](#) [Tab 1].

<sup>6</sup> *Ibid* at [para 29](#) [Tab 1].

- (i) taken various measures to stabilize their affairs;
  - (ii) engaged with a number of their stakeholders, namely their employees, the intermediaries involved directly with patients in clinical trials, the agent to their only secured creditors, Horizon Technology Finance Corporation (“**Horizon**”), their suppliers, etc.;
  - (iii) developed, in consultation with the Monitor and Horizon, a SISP which they are asking this Court to approve in order to solicit offers for a broad range of executable transactions in respect of their business and/or assets, the whole with a view to maximizing value for their stakeholders; and
  - (iv) designed, in consultation with the Monitor and Horizon, a KERP which they are asking this Court to approve to ensure that those employees necessary for the stability of IMV’s business remain engaged and as such enhance the prospects of a successful restructuring, for the benefit of all of IMV’s stakeholders.
11. The extension of the Stay Period is necessary and appropriate in the circumstances in order to allow for the continued limited operations of IMV – preserving its going concern value – while the Monitor, with the Applicants, implements the SISP and the claims process.<sup>7</sup>
12. IMV has sufficient funds to get through the Stay Period, including a provision for the payments under the KERP and the payments to the critical suppliers, if required.<sup>8</sup>
13. The Applicants have acted and are continuing to act in good faith and with due diligence in these CCAA proceedings since the granting of the Initial Order, and no one has suggested otherwise.<sup>9</sup>
14. In light of the foregoing, it is respectfully submitted that the applicable criteria are amply satisfied and that Stay Period should be extended until and including July 17, 2023.

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<sup>7</sup> Hall Supplemental Affidavit, *supra* note 3, at para 20; *Century Services Inc v Canada (Attorney General)*, [2010 SCC 60](#) at [para 18](#) [Tab 2].

<sup>8</sup> Hall Supplemental Affidavit, *supra* note 3, at para 21.

<sup>9</sup> *Ibid* at para 22.

**(ii) The Court Should Increase the Quantum of the Administration Charge and Grant Same a Super-Priority**

15. On May 1<sup>st</sup>, 2023, this Court approved, as part of the Initial Order, an Administration Charge in an *initial* amount of \$350,000 to secure the payment of the professional fees and disbursements of the Monitor, counsel to the Monitor and counsel to the Applicants for the initial Stay Period, which charge currently does not have priority over the security in favour of existing secured creditors or the claims of the federal and provincial governments that can be secured by a deemed trust.
16. IMV now seeks an increase to such Administration Charge to an *aggregate* amount of \$750,000. This increase in the Administration Charge is based upon additional fees that the foregoing professionals expect to incur during the pendency of these CCAA Proceedings. The Applicants have worked in consultation with the Monitor and engaged in discussions with Horizon to determine the appropriate quantum of the Administration Charge, which was based upon various professionals' previous history and experience with restructurings of similar scope and complexity.<sup>10</sup>
17. Section 11.52 of the CCAA expressly provides this Court with the statutory authority to grant the Administration Charge and order that such charge rank in priority over the claim of any secured creditor of the company.<sup>11</sup> In deciding whether to make such an order, Courts have considered a number of factors including: (a) the size and complexity of the businesses being restructured; (b) the proposed role of the beneficiaries of the charge; (c) whether there is an unwarranted duplication of roles; (d) whether the quantum of the proposed charge appears to be fair and reasonable; (e) the position of the secured creditors likely to be affected by the charge; and (f) the position of the Monitor.<sup>12</sup>
18. Having regards to these criteria, the Applicants submit the following:

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<sup>10</sup> See *Re Just Energy*, 2021 ONSC 1793, at [paras 106-113 \[Tab 3\]](#); *Timminco Limited (Re)*, 2012 ONSC 506 [*Timminco*] at [para 10 \[Tab 4\]](#).

<sup>11</sup> CCAA, s 11.52; *Canwest Publishing Inc, Re*, 2010 ONSC 222 [*Canwest Publishing*] at [para 53 \[Tab 5\]](#).

<sup>12</sup> *Canwest Publishing*, *supra* note 11, at [para 54 \[Tab 5\]](#); *Nordstrom Canada Retail, Inc*, 2023 ONSC 1422 [*Nordstrom*] at [paras 54-55 \[Tab 6\]](#); *In the Matter of the Companies' Creditors Arrangement Act and In the Matter of a Plan of Compromise or Arrangement of Original Traders Energy Ltd and 2496750 Ontario Inc*, 2023 ONSC 753 [*Original Traders*] at [para 68 \[Tab 7\]](#).

- (i) IMV's operations consist mainly in research and development, including clinical trials, in the highly-regulated and complex biopharmaceutical industry. IMV is currently sponsoring and overseeing six clinical trials being conducted across 12 jurisdictions. The complexity of IMV's business warrant the granting of the Administration Charge;<sup>13</sup>
  - (ii) the beneficiaries of the Administration Charge have, and will continue, to contribute to these CCAA Proceedings and assist the Applicants throughout the CCAA Proceedings to help them achieve restructuring objectives;
  - (iii) each of the proposed beneficiary of the Administration Charge is performing unique functions without duplication of roles;
  - (iv) Horizon, the agent for the only secured creditors affected by the priority sought for the Administration Charge, consents to same;<sup>14</sup>
  - (v) the federal and provincial governments that are likely to be affected by the priority being sought for the Administration Charge were given notice of the granting of the Administration Charge;
  - (vi) the quantum of the proposed charge was established in consultation with the Monitor and is fair and reasonable;<sup>15</sup> and
  - (vii) the Monitor is supportive of the granting of the Administration Charge.
19. Furthermore, in accordance with the principles set out in *Canada North*, a Court may order that a charge has priority over all other claims, including over claims of His Majesty which are potentially secured by a deemed trust, namely where without a super-priority charge, a particular professional would not act.<sup>16</sup>

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<sup>13</sup> Hall Affidavit, *supra* note 2, at paras 28-33, 48.

<sup>14</sup> Hall Supplemental Affidavit, *supra* note 3, at para 27.

<sup>15</sup> Hall Affidavit, *supra* note 2, at para 35.

<sup>16</sup> *Canada v Canada North Group Inc*, [2021 SCC 30](#) at [paras 4, 72-73](#) [Tab 8].

20. The professionals have advised IMV that they are willing to provide or continue to provide their professional services during the restructuring only if they are protected by the Administration Charge with the super-priority requested. The professionals are essential to a successful restructuring and their implication will enhance the prospect of a successful restructuring, which would ultimately benefit all of IMV's stakeholders.<sup>17</sup>
21. The Applicants further submit that, in accordance with the Initial Order, the professionals are paid on a weekly basis in order to minimize the consequences associated with the granting of the Administration Charge.
22. In light of the foregoing, IMV respectfully submits that it is appropriate to grant the Administration Charge, as increased and with the priority being sought.

**(iii) The Court Should Reduce the Quantum of the Directors' Charge and Grant Same a Super-Priority**

23. On May 1, 2023, this Court approved, as part of the Initial Order, a Directors' Charge in an *initial* amount of \$550,000 as security for the potential liability of the Directors and Officers incurred in such capacity after the date of the Initial Order for the initial Stay Period, which charge currently does not have priority over the security in favour of existing secured creditors.
24. IMV now seeks to modify this charge in order to reduce the quantum of the Directors' Charge to an *aggregate* amount of \$275,000. This reduction is a result of the lay-offs which occurred on May 1, 2023, further to the issuance of the Initial Order, which have reduced potential director and officer liabilities.<sup>18</sup>
25. IMV is also requesting that the Directors' Charge be provided with a priority over all other charges and security interests, including over the claims of the federal and provincial governments subject to a deemed trust, except for the Administration Charge.

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<sup>17</sup> Hall Supplemental Affidavit, *supra* note 3, at para 25; *Azure Dynamics Corporation (Re)*, [2012 BCSC 781](#) at [para 25-26 \[Tab 9\]](#).

<sup>18</sup> Hall Supplemental Affidavit, *supra* note 3, at para 13.



26. Section 11.51 of the CCAA provides this Court with the express statutory jurisdiction to grant the Directors' Charge in an amount the Court considers appropriate, provided notice is given to the secured creditors who are likely to be affected by it.<sup>19</sup>
27. The Directors and Officers benefit from directors' and officers' insurance coverage up to an amount of \$20 million; however, this coverage may prove insufficient or subject to standard exclusions which could make it difficult to cover all potential liabilities that can arise in the context of a restructuring process, including liabilities for employee wages and vacation pay.<sup>20</sup> The Directors and Officers have significant concerns about their potential personal liability and have indicated that their continued service and involvement in the CCAA Proceedings is conditional upon the granting of the Directors' Charge.<sup>21</sup>
28. IMV requires the continued participation of its Directors and Officers throughout the CCAA Proceedings; the resignation of the Directors and Officers would likely render these CCAA Proceedings and the conduct of a sale and investment solicitation process more challenging, and possibly more costly, to the detriment of IMV's creditors and other stakeholders.<sup>22</sup>
29. Indeed, to ensure the stability of the business during the restructuring period, the Applicants need the ongoing assistance of their Directors and Officers, who have considerable institutional knowledge and specialized expertise which will namely be useful during the conduct of the SISP.
30. The Applicants submit that the approval of the Directors' Charge is warranted and necessary, and that it is appropriate in the present circumstances given that:
  - (i) the Directors' Charge would allow indemnification of the Directors and Officers only to the extent that such claims are not covered by the current insurance coverage in place for the Directors and Officers;

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<sup>19</sup> CCAA, [s 11.51](#).

<sup>20</sup> Hall Supplemental Affidavit, *supra* note 3, at para 31.

<sup>21</sup> Hall Supplemental Affidavit, *supra* note 3, at paras 30, 32; Nordstrom, *supra* note 12, [at para 57](#) [Tab 6].

<sup>22</sup> Hall Affidavit, *supra* note 2, at para 47; Hall Supplemental Affidavit, *supra* note 3, at para 28; *Original Traders*, *supra* note 12, [at para 70](#) [Tab 7].

- (ii) the Directors' Charge would cover only obligations and liabilities in the context of the present proceedings and does not cover willful misconduct or gross negligence;
- (iii) the Directors and Officers are actively involved in efforts to address the current circumstances facing IMV;
- (iv) the amount of the Directors' Charge has been calculated, with the assistance of the Monitor, based on the estimated potential exposure of the Directors and Officers to certain corporate liabilities;
- (v) Horizon, the agent for the only secured creditors affected by the priority sought for the Administration Charge, consents to same;<sup>23</sup>
- (vi) the federal and provincial governments that are likely to be affected by the priority being sought for the Administration Charge were given notice of the granting of the Administration Charge;
- (vii) the Monitor is supportive of the granting of the Administration Charge.

31. In light of the foregoing, IMV respectfully submits that it is appropriate to grant the Directors' Charge, in the amount requested and with the priority being sought.

**(iv) The Applicants Should Be Authorized to Pay Certain Critical Suppliers**

32. IMV relies on investigators and Clinical or Contract Research Organizations, with internal oversight, to conduct its clinical trials, third party clinical kitting and distribution as well as patient sample management companies to ensure compliance with the various requirements applicable to the importation and exportation of drug product candidates in the jurisdictions in which it conducts its clinical trials.<sup>24</sup> Many of these suppliers are critical to IMV's business and are small and medium enterprises, which are dependent on continuous payment from IMV, or are located outside the United States and Canada such

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<sup>23</sup> Hall Supplemental Affidavit, *supra* note 3, at para 35.

<sup>24</sup> Hall Supplemental Affidavit, *supra* note 3, at para 36.

that it may be difficult to require them to comply with the terms of any Order of this Court before any recognition order of same has been issued.<sup>25</sup>

33. Any interruption of service from these third parties, either because they are unable to continue to provide their services to IMV or refuse to do so on account of unpaid pre-filing amounts owed to them by IMV, would prevent IMV from continuing to gather clinical data from its ongoing clinical trials and providing ongoing treatment to the patients in screening or enrolled in ongoing clinical trials as of May 1, 2023.<sup>26</sup>
34. In light of the foregoing, IMV is seeking the authorization to pay, with the consent of the Monitor, amounts owing for goods or services actually provided to the Applicants prior to the date of the Initial Order by third parties, if, in the opinion of IMV, such third party is critical to the business and ongoing operations of IMV and such third party would sustain material prejudice if such payment is not made, up to a maximum aggregate amount of \$350,000.
35. “There is ample authority supporting the Court’s general jurisdiction to permit payment of pre-filing obligations to persons whose services are critical to the ongoing operations of the debtor companies”.<sup>27</sup>
36. Courts have recognized the importance of protecting those critical suppliers for the benefit of all stakeholders by authorizing debtors to pay any pre-filing unpaid claim of suppliers they deemed critical where the debtors were not seeking a charge in respect of critical suppliers.<sup>28</sup>
37. In granting a debtor the authority to pay certain pre-filing amounts to critical suppliers, the Courts generally consider a number of factors, including:
  - (i) whether the goods and services were integral to the business of the applicants;

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<sup>25</sup> Hall Supplemental Affidavit, *supra* note 3, at para 37.

<sup>26</sup> *Ibidem*.

<sup>27</sup> *Cinram International Inc (Re)*, [2012 ONSC 3767](#) [*Cinram*] at [para 37](#), citing with approval the Factum attached as Schedule “C” at para 67 [**Tab 10**]; *Northstar Aerospace, Inc (Re)*, [2012 ONSC 4546](#) [*Northstar*] leave to appeal refused ([2013 ONCA 600](#)) at [para 11](#) [**Tab 11**].

<sup>28</sup> *Groupe Dynamite Inc* (17 September 2020) Que SC Montréal 500-11-058763-208 ([Amended and Restated Initial Order](#)) at para 21 [**Tab 12**]; *Nemaska Lithium Inc* (13 February 2020) Que SC Montréal 500-11-057716-199 ([Amended and Restated Initial Order \(Second Amendment and Restatement\)](#)) at para 26 [**Tab 13**]; *Cinram*, *supra* note 27, at [para 37](#), citing with approval the Factum attached as Schedule “C” at para 68 [**Tab 10**]; *Northstar*, *supra* note 27 at [para 11](#) [**Tab 11**].

- (ii) the applicants' dependency on the uninterrupted supply of the goods or services;
  - (iii) the fact that no payments would be made without the consent of the Monitor;
  - (iv) the Monitor's support and willingness to work with the applicants to ensure that payments to suppliers in respect of pre-filing liabilities are minimized;
  - (v) whether the applicants had sufficient inventory of the goods on hand to meet their needs; and
  - (vi) the effect on the debtors' ongoing operations and ability to restructure if they were unable to make pre-filing payments to their critical suppliers.<sup>29</sup>
38. For the reasons outlined above, the services provided by the critical suppliers are essential to IMV's business and any interruption of these services would disrupt IMV's operations.
39. The Monitor is supportive of the relief sought and will work with and support the Applicants to ensure that payments to suppliers in respect of pre-filing liabilities are minimized.
40. Furthermore, no payment may be made without the consent of the Monitor.
41. In light of the foregoing, it is respectfully submitted that the aforementioned criteria are satisfied, that the relief sought is appropriate in the circumstances and that the Applicants should be authorized to pay, with the consent of the Monitor, amounts owing for goods or services actually provided to the Applicants prior to the date of the Initial Order by third parties, if, in the opinion of IMV, such third party is critical to the business and ongoing operations of IMV and such third party would sustain material prejudice if such payment is not made, up to a maximum aggregate amount of \$350,000.

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<sup>29</sup> Cinram, *supra* note 27, at [para 37](#), citing with approval the Factum attached as Schedule "C" at para 68 **[Tab 10]**; Northstar, *supra* note 27 at [para 11](#) **[Tab 11]**.

**(v) The KERP and KERP Charge Should be Approved<sup>30</sup>**

42. With a view to securing the ongoing and continued support of certain key employees, the Applicants are seeking the approval of a KERP and related KERP Charge in the *aggregate* amount of \$575,000 to secure the Applicants' obligations under the KERP (the "**KERP Charge**"), which charge is to have priority over all other charges and security interests, including over the claims of the federal and provincial governments subject to a deemed trust, except for the Administration Charge and the Directors' Charge.<sup>31</sup>
43. The terms and conditions of the KERP are set out in the Key Employee Bonus Agreement<sup>32</sup> and can be summarized as follows:
- (i) the KERP provides for a one-time payment upon the occurrence of (A) the closing of a Transaction,<sup>33</sup> (B) the completion of the winding up of the Applicants' operations, including its ongoing clinical trials, (C) an assignment in bankruptcy under the *Bankruptcy and Insolvency Act*<sup>34</sup> (D) the termination of the Participant's employment by any of the Applicants without just cause and/or serious reason between the date of the KERP and the payment of the entitlement, or (E) an order of this honourable Court authorizing the payment of the Key Employee Bonus; and
  - (ii) for participants who are also members of senior management, the KERP also provides an incentive component; such participants are eligible to obtain an additional payment upon the closing of a Transaction if they are still actively employed by IMV when the closing of the Transaction occurs.<sup>35</sup>

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<sup>30</sup> Capitalized terms used in this section and not otherwise defined shall have the meanings ascribed to them in the Key Employee Bonus Agreement, Schedule B to the proposed Amended and Restated Initial Order, unless the context shall otherwise require.

<sup>31</sup> Hall Supplemental Affidavit, *supra* note 3, at para 46.

<sup>32</sup> Key Employee Bonus Agreement, Schedule B to the proposed Amended and Restated Initial Order [*KERP Agreement*].

<sup>33</sup> In the context of the KERP, a "**Transaction**" means, (i) the direct or indirect sale of all or a majority of the equity securities of any of the Applicant to a third party (an "**Acquirer**"), (ii) the merger or combination of any of the Applicants with an Acquirer or (iii) an Acquirer's acquisition of all or a significant portion of the assets, properties or business of any of the Applicants (iv ) any sale or disposition (regardless of form) of all or more than 2/3 of the equity securities, assets, properties or business of the Applicants, or any transaction involving the restructuring, reorganization (whether or not pursuant the CCAA, the *Bankruptcy and Insolvency Act* (Canada) (the "**BIA**") or any federal or provincial corporate laws in Canada, or compromise or arrangement of the Applicants' debt obligations

<sup>34</sup> RSC 1985, c B-3.

<sup>35</sup> KERP Agreement.

44. Under section 11 the CCAA, the Court may make any order that it considers appropriate in the circumstances.<sup>36</sup> Courts have used this power to approve KERPs and create a charge securing the obligations of debtor companies under such KERPs, although it is not specifically provided in the CCAA.<sup>37</sup>
45. Although the factors to be considered by the Court in granting a KERP vary from case to case<sup>38</sup>, in deciding whether to approve a KERP and grant a KERP charge in the context of CCAA proceedings, the following factors are generally considered:
- (i) whether the Monitor supports the KERP;
  - (ii) whether the employees to which the KERP applies would consider other employment options if the KERP were not secured by the KERP charge;
  - (iii) whether the continued employment of the employees to which the KERP applies is important for the stability of the business and to enhance the effectiveness of the marketing process;
  - (iv) the employees' history with and knowledge of the debtor;
  - (v) the difficulty in finding a replacement to fulfill the responsibilities of the employees to which the KERP applies;
  - (vi) whether the KERP was approved by the board of directors, including independent directors;
  - (vii) whether the KERP and KERP charge are supported or consented to by secured creditors of the debtor; and
  - (viii) whether the payments under the KERP are payable upon the completion of a restructuring process.<sup>39</sup>

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<sup>36</sup> CCAA, s [11](#); See Factum in Support of the Issuance of an Initial Order dated April 29, 2023 at paras 78-82 regarding the Court's use of its discretion under section 11 of the CCAA.

<sup>37</sup> *U.S. Steel Canada Inc (Re)*, [2014 ONSC 6145](#) at [para 27 \[Tab 14\]](#); *Essar Steel Algoma Inc (Re)*, [2015 ONSC 7656](#) at [para 10 \[Tab 15\]](#); *Aralez Pharmaceuticals Inc (Re)*, [2018 ONSC 6980 \[Aralez\]](#) at [paras 29, 57 \[Tab 16\]](#).

<sup>38</sup> *Re Walter Energy Canada Holdings Inc*, [2016 BCSC 107](#) at [para 58 \[Tab 17\]](#).

<sup>39</sup> *Grant Forest Products Inc (Re) (2009)*, [57 C.B.R. \(5th\) 128 2009 \(Ont. SCJ\)](#) at [paras 8-10, 19 \[Tab 18\]](#); *Aralez*, *supra* note 37, at [para 29 \[Tab 16\]](#); *Mountain Equipment Co-Operative (Re)*, [2020 BCSC 1586 \[MEC\]](#) at [paras 62-71 \[Tab 19\]](#).

46. As Dunphy J. recently held in *Aralez*, three criteria underlay the factors applicable to approving a KERP or similar incentive program in an insolvency proceeding: (i) arm's length safeguards, (ii) necessity and (iii) reasonableness of design.<sup>40</sup> Within these parameters, the scope of the KERP and the amounts allocated to beneficiaries are both highly fact dependent, based on the needs of the particular CCAA debtor and the role of the beneficiaries in the business and the restructuring.
47. The Court's role in assessing a request to approve a KERP "is to assess the totality of the circumstances to determine whether the process has provided a reasonable means for objective business judgment to be brought to bear and whether the end result is objectively reasonable".<sup>41</sup>
48. The Applicants submit that the approval of the KERP and related KERP Charge is warranted, necessary, and appropriate in the present circumstances given that:
- (i) the KERP was developed by the Applicants with the oversight of the Monitor and in consultation with Horizon;<sup>42</sup>
  - (ii) the participants of the KERP have significant experience and specialized expertise, including in the area of clinical trial and the regulatory environment of the Applicants, that cannot be easily replicated or replaced;
  - (iii) the KERP was approved by IMV's board of directors, which is mainly composed of independent directors;<sup>43</sup>
  - (iv) the participants of the KERP will likely have other, more certain, employment opportunities arising and will be faced with a significantly increased workload during the restructuring process;<sup>44</sup>
  - (v) the continued employment of the KERP participants is necessary for the stability of IMV's business and to ensure an efficient restructuring and to enhance the

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<sup>40</sup> *Aralez*, *supra* note 37, at [para 30](#) [Tab 16].

<sup>41</sup> *Aralez*, *supra* note 37, at [para 27](#) [Tab 16].

<sup>42</sup> Hall Supplemental Affidavit, *supra* note 3, at para 47.

<sup>43</sup> Hall Affidavit, *supra* note 2, at para 47.

<sup>44</sup> Hall Supplemental Affidavit, *supra* note 3, at para 50.

prospects of a successful restructuring, the whole for the benefit of all of IMV's stakeholders;

- (vi) the amount of the KERP Charge is reasonable and was established in consultation with the Monitor and Horizon;<sup>45</sup> and
- (vii) the Monitor is of the view that the structure of the KERP and the quantum of the amounts payable to KERP participants are reasonable in the circumstances and recommends the approval of the KERP and the granting of the KERP Charge.

49. In light of the foregoing, IMV respectfully submits that it is appropriate to approve the KERP and grant the KERP Charge, as requested.

**(vi) The SISP Should be Approved<sup>46</sup>**

50. It is well recognized that a CCAA court has jurisdiction to approve a sale process in relation to a CCAA debtor's business and assets, prior to the development (or even in the absence) of a plan of compromise and arrangement.<sup>47</sup> This Court identified in *Nortel* a number of factors that should be considered in determining whether to authorize a sale process, including:

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<sup>45</sup> MEC, *supra* note 39, at [paras 62-71](#) [KERP Charge of \$778,000] [Tab 19]; *ENTREC Corporation (Re)* (25 May 2020) AB QB Calgary 2001 06423 ([Amended and Restated Initial Order](#)) at paras 40 [KERP Charge of \$1,500,000] [Tab 20]; *AgMedica Bioscience inc* (9 March 2020) Ont SCJ Toronto CV-19-00632052-00CL ([Key Employee Retention Program and Stay Extension Order](#)) at para 6 [KERP Charge of \$200,000] [Tab 21].

<sup>46</sup> Capitalized terms used in this section and not otherwise defined shall have the meanings ascribed to them in SISP Procedures, Schedule C to the proposed Amended and Restated Initial Order, unless the context shall otherwise require.

<sup>47</sup> *Nortel Networks Corp. (Re)* (2009), [55 C.B.R. \(5th\) 229](#) (Ont. SCJ) [*Nortel* 229] at [para 48](#) [Tab 22].



- (i) Is a sale transaction warranted at this time?
  - (ii) Will the sale benefit the whole “economic community”?
  - (iii) Do any of the debtors’ creditors have a *bona fide* reason to object to a sale of the business?
  - (iv) Is there a better viable alternative?<sup>48</sup>
51. Although the above *Nortel* criteria were articulated in the CCAA context prior to the 2009 amendments, this Court in *Brainhunter* confirmed that the same criteria apply under the post-2009 CCAA.<sup>49</sup>
52. Section 36 of the CCAA directly applies only in the context of the approval of a sale, not of a sale and investment solicitation process.<sup>50</sup> In other words, it is not this Court’s role in approving a sale and investment solicitation process to apply the section 36 criteria. Such criteria will apply and be considered by the Court if a transaction is identified further to the implementation of the SISP and the Court is eventually asked to approve that transaction. Any approval pursuant to section 36 of the CCAA will be sought at the conclusion of the SISP and in relation to a successful SISP.
53. Notwithstanding the foregoing, the *Nortel* criteria for approving a sale and investment solicitation process should be evaluated in light of the considerations that may ultimately apply when seeking approval for a transaction under section 36 of the CCAA.<sup>51</sup> The Court should therefore also indirectly consider the criteria set out in paragraph 36(3) of the CCAA, which relate to the approval of the contemplated transaction itself, when deciding whether to approve a proposed sale process, namely : whether the proposed SISP is likely to satisfy the requirement that the process be fair and that the best price has been obtained, whether the Monitor supports the SISP, as well as the extent to which creditors were consulted and other relevant factors.<sup>52</sup>

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<sup>48</sup> *Nortel 229*, *supra* note 47, at [para 49](#) [Tab 22].

<sup>49</sup> *Brainhunter Inc, (Re)*, (2009), 62 CBR (5th) 41 (Ont. SCJ) [*Brainhunter*] at [paras 15-17](#) [Tab 23]; *Green Growth Brands, (Re)*, 2020 ONSC 3565 at [para 61](#) [Tab 24].

<sup>50</sup> *Brainhunter*, *supra* note 49, at [para 17](#) [Tab 23].

<sup>51</sup> *Ibid* at [para 16](#) [Tab 23].

<sup>52</sup> CCAA, s [36\(3\)](#); *Royal Bank v Soundair*, 7 CBR (3d) 1 (Ont CA) [Tab 25].

54. The SISP and related SISP Procedures set forth the terms and procedures for a fair and efficient solicitation process, and take under consideration the fact that a pre-filing strategic process has already been conducted during the approximate six week period preceding these CCAA Proceedings.<sup>53</sup>
55. Some of the key features of the SISP, as set out in the SISP Procedures, provide, *inter alia*, that :
- (i) the SISP is intended to solicit offers for a broad range of executable transactions in respect of IMV's business and/or assets;
  - (ii) the SISP will be conducted by the Monitor with the assistance of the Applicants and in consultation with Horizon;
  - (iii) there will be two mandatory phases to identify a successful bid : (a) a non-binding LOI phase to qualify Prospective Bidders as Qualified Bidders and (b) a binding offer phase where Qualified Bidders submit binding Qualified Bids; and
  - (iv) if the Applicants and the Monitor, in consultation with Horizon, determine that more than one Qualified Bid should be considered, they may, without having the obligation to do so, conduct an Auction to select a Successful Bid.
56. The SISP Procedures provide for the following milestones, with the necessary flexibility to reduce or extend these milestones depending on the interest from potential bidders:

<b>Milestone</b>	<b>Deadline</b>
Solicitation of interest and access to Phase 1 data room.	<b>May 15, 2023</b> – No later than 5:00 pm (Halifax time)
LOI Deadline	<b>June 19, 2023</b> – No later than 5:00 pm (Halifax time)
Determination of Qualified Bidders	No later than <b>June 30, 2023</b>
Qualified Bid Deadline	No later than <b>July 10, 2023</b> .
Auction	If required, with the consent of the secured creditors
Target Closing Date	<b>July 28, 2023</b>

<sup>53</sup> Hall Supplemental Affidavit, *supra* note 3, at paras 14-19.

57. The Applicants submit that the *Nortel* criteria are satisfied in the circumstances and that it is an appropriate use of this Court's discretion to approve the proposed SISP.

- (i) the identification of parties having interest in proposing a broad range of executable transaction alternatives (sale of assets, restructuring, recapitalization and/or refinancing) involving the Applicants' business and all property, assets and undertaking at this stage of the CCAA proceedings appears to be the viable restructuring alternative for IMV to identify transactions which would benefit all of its stakeholders;<sup>54</sup>
- (ii) the SISP emphasizes the interests of all the Applicants' stakeholders and will benefit the whole "economic community";
- (iii) no creditors have a bona fide reason to oppose the SISP proposed by the Applicants since the SISP is conducted with a view to maximizing the value of the Applicants' business and property for the benefit of all of the Applicants' stakeholders and to providing the Applicants with the necessary stability to consider and review all available reorganization options; and
- (iv) the Monitor and Horizon have participated in the elaboration of the SISP, have approved it and are supportive of its approval by the Court.<sup>55</sup>

58. IMV believes the timeline in the SISP Procedures is reasonable in the circumstances and will yield the maximum value for the benefit of all of IMV's stakeholders. Accordingly, it is respectfully submitted that the SISP should be approved.

**B. The Claims Process Should be Approved<sup>56</sup>**

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<sup>54</sup> Hall Supplemental Affidavit, *supra* note 3, at paras 39, 41.

<sup>55</sup> Hall Supplemental Affidavit, *supra* note 3, at paras 40, 45.

<sup>56</sup> Capitalized terms used herein and not otherwise defined shall have the meanings associated to them in Claims Process Order, unless the context shall otherwise require.

59. Pursuant to section 11 of the CCAA, the Court has the jurisdiction to make any order it considers appropriate in the circumstances, which includes the ability to approve a process to solicit claims against a debtor company, its directors and officers as well as against other parties involved in the restructuring against which claims could be filed :<sup>57</sup>

[8] Claims procedure orders are routinely granted under the court's general powers under ss. 11 and 12 of the CCAA. Claims procedure orders are designed to create processes under which all of the creditors of an applicant and its directors and officers can submit their claims for recognition and valuation. Claims procedures usually involve establishing a method to communicate to potential creditors that there is a process by which they must prove their claims by a specific date. The procedure usually includes an opportunity for the debtor or its representative to review and, if appropriate, contest claims made by creditors. If claims are not agreed upon and cannot be settled by negotiation, then the claims procedure orders may go on to establish an adjudication mechanism in court or, typically in Ontario, by arbitration that is then subject to an appeal to the court. Claims procedure orders will usually also establish a "claims bar date" by which claims must be submitted by creditors. Late claims may not be allowed as it can be necessary to establish a cut off to give accurate numbers for voting and distribution purposes.

[Our emphasis]

60. Furthermore, section 12 of the CCAA, which provides that the Court has power to "fix deadlines for the purposes of voting and for the purposes of distributions under a compromise or arrangement", has been held to be sufficient authority for a CCAA Court to grant claims process orders and claims bar orders.<sup>58</sup>
61. A claims process "is designed to streamline the resolution of the multitude of claims against an insolvent debtor in the most time-sensitive and cost-efficient manner".<sup>59</sup> Contrary to a claim process in the context of a bankruptcy, a claim process governed by the CCAA "does not set out a specific procedure for creditor claims to be proven and counted".<sup>60</sup>
62. The general practice in CCAA proceedings is for debtors companies to apply to the Court for approval of a process to solicit claims against the debtor company and to establish a deadline for filing claims.<sup>61</sup>

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<sup>57</sup> CCAA, s [11, 12](#); *Re TOYS "R" US (Canada) Ltd*, [2018 ONSC 609](#) [*Toys R Us*] at [para 8](#) [**Tab 26**]; *Roman Catholic Episcopal Corporation of St. John's (Re)*, [2023 NLSC 5](#) at [para 21](#) [**Tab 27**]. See also Factum in Support of the Issuance of an Initial Order dated April 29, 2023 at 78-82 regarding the Court's use of its discretion under section 11 of the CCAA.

<sup>58</sup> CCAA, s [12](#); *Toys R Us*, *supra* note 57, at [para 8](#) [**Tab 26**]; *Timminco*, *supra* note 10, at [para 40](#) [**Tab 4**].

<sup>59</sup> *Canwest Global Communications Corp.*, [2011 ONSC 2215](#) at [para 40](#) [**Tab 28**].

<sup>60</sup> *Toys R Us*, *supra* note 57, at [para 7](#) [**Tab 26**].

<sup>61</sup> *Ibid* at [para 8](#) [**Tab 26**].

63. The Court routinely approves claims processes in CCAA restructurings. A claims process order, and, in particular, the establishment of a claims-bar date allows the debtor to “determine the universe of claims and the potential distribution to creditors, and creditors are in a position to make an informed choice as to the alternatives presented to them. If distributions are being made or a plan is presented to creditors and voted upon, stakeholders should be able to place a degree of reliance in the claims bar process.”<sup>62</sup>
64. Claims procedure orders should be both flexible and expeditious, in order to achieve the broad remedial objectives of the CCAA and ensure that stakeholders are treated as advantageously and fairly as the circumstances permit in a restructuring process.<sup>63</sup> The order must be drafted carefully to ensure that it is fair and reasonable to all stakeholders, including those who will be directly affected by the acceptance of other claims.<sup>64</sup>
65. The claims process has been designed to make the process as easy as possible for Creditors to have their Claims recognized and resolved. The combination of the “negative notice” or “reverse” claims process for Employee Claims and the traditional claims process along with flexible adjudication mechanisms, ensures that the universe of claims is comprehensively solicited and that the nature, quantum, and validity of Claims are determined fairly, comprehensively, and expeditiously at the appropriate time.<sup>65</sup>
66. The Claims Bar Date were determined in consultation with the Monitor and the Applicants submit that they are reasonable as they provide sufficient time for Creditors to evaluate and submit any Proof of Claim or for an Employee to submit a Notice of Dispute.<sup>66</sup>
67. The proposed claims process appropriately balances competing views and ensures that Claims are treated in accordance with the remedial objectives of the CCAA. And importantly, it will provide the Applicants with the necessary information regarding the universe of Claims against them, as they move forward with their restructuring and develop a solution for the benefit of all of their stakeholders.

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<sup>62</sup> Timminco, *supra* note 10, at [para 43](#) [Tab 4].

<sup>63</sup> *ScoZinc Ltd (Re)*, [2009 NSSC 136](#) at [para 23](#) [Tab 29].

<sup>64</sup> *Laurentian University of Sudbury*, [2021 ONSC 3885](#) at [para 32](#) [Tab 30].

<sup>65</sup> Hall Supplemental Affidavit, *supra* note 3, at paras 52, 54.

<sup>66</sup> *Ibid* at para 54.

68. In light of the foregoing, it is respectfully submitted that the Claims Process Order should be granted, as requested.

**C. The Schedules to the KERP Should be Kept Strictly Confidential and Filed Under Seal<sup>67</sup>**

69. The schedule to the KERP Agreement contain sensitive personal information about the employees of IMV who are participating in the KERP.

70. In light of the foregoing, the Applicants are seeking sealing and confidentiality order in respect of the schedules to the KERP Agreement so that they be sealed and not form part of the public record pending further order of the Court. Such sealing orders are regularly granted in the context of CCAA proceedings to protect the privacy of KERP participants.<sup>68</sup>

71. No party will suffer a prejudice as a result of the sealing order requested as only the schedules to the KERP Agreement will be sealed and the terms and conditions of the KERP Agreement remain available and will form part of the public record. The KERP Agreement was designed to limit the information in the schedules to same to confidential information and no alternative measure would protect the privacy of the KERP participants.

**PART V – NATURE OF THE ORDER SOUGHT**

72. The Applicants therefore request (i) an Amended and Restated Initial Order substantially in the form of the draft Order attached as Schedule “A” to the Notice of Motion and (ii) a Claims Procedure Order substantially in the form of the draft Order attached as Schedule “B” to the Notice of Motion.

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<sup>67</sup> Capitalized terms used herein and not otherwise defined shall have the meanings associated to them in the Hall Key Employee Bonus Agreement, unless the context shall otherwise require.

<sup>68</sup> *Just Energy Group Inc (Re)* (9 March 2021) Ont SCJ Toronto CV-21-00658423-00CL ([Amended and Restated Initial Order issued March 9, 2021](#)) at para 70 [Tab 31].

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 4<sup>th</sup> day of May, 2023:

*McCarthy Tétrault LLP*

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**SCHEDULE A**  
**INDEX OF AUTHORITIES**

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1.	<i>North American Tungsten Corporation Ltd (Re)</i> , <a href="#">2015 BCSC 1376</a>
2.	<i>Century Services Inc v Canada (Attorney General)</i> , <a href="#">2010 SCC 60</a>
3.	<i>Re Just Energy</i> , <a href="#">2021 ONSC 1793</a>
4.	<i>Timminco Limited (Re)</i> , <a href="#">2012 ONSC 506</a>
5.	<i>Canwest Publishing Inc, Re</i> , <a href="#">2010 ONSC 222</a>
6.	<i>Nordstrom Canada Retail, Inc</i> , <a href="#">2023 ONSC 1422</a>
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16.	<i>Aralez Pharmaceuticals Inc (Re)</i> , <a href="#">2018 ONSC 6980</a>
17.	<i>Re Walter Energy Canada Holdings Inc</i> , <a href="#">2016 BCSC 107</a>



18.	<i>Grant Forest Products Inc (Re) (2009)</i> , <a href="#">57 C.B.R. (5th) 128 2009 (Ont. SCJ)</a>
19.	<i>Mountain Equipment Co-Operative (Re)</i> , <a href="#">2020 BCSC 1586</a>
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30.	<i>Laurentian University of Sudbury</i> , <a href="#">2021 ONSC 3885</a>
31.	<i>Just Energy Group Inc (Re) (9 March 2021) Ont SCJ Toronto CV-21-00658423-00CL</i> ( <a href="#">Amended and Restated Initial Order issued March 9, 2021</a> )