

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**”) obtained relief under the *Companies’ Creditors Arrangement Act*¹ (the “**CCAA**”) by an initial order dated May 1, 2023 (the “**Initial Order**”). The Initial Order, among other things, appointed FTI Consulting Canada Inc. as monitor of the Applicants in these proceedings (the “**Monitor**”) and provided an initial stay of proceeding until and including May 5, 2023 (the “**Stay Period**”). The Court granted an Amended and Restated Initial Order (the “**ARIO**”) on May 5, 2023, which, among other things, extended the Stay Period until and including July 17, 2023, and approved 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.
2. On May 9, 2023, the Court granted a Claims Process Order, approving the procedure for the determination and adjudication of claims against the Applicants and their directors and officers (the “**Claims Process**”).
3. On July 17, 2023, the Court granted an Extension Order which, among other things, extended the Stay Period until and including August 18, 2023.

¹ RSC 1985, c C-36, as amended.

4. On August 17, 2023, the Court granted a Second Extension Order which, among other things, extended the Stay Period until and including September 29, 2023.
5. On September 6, 2023, the Court granted an Approval and Vesting Order (the “**Approval and Vesting Order**”) which, among other things, approved the transaction contemplated by the Agreement of Purchase and Sale dated September 1, 2023, by and between Horizon Technology Finance Corporation (“**Horizon**”), as purchaser, and IMV Inc. and IVT, as vendors (the “**Purchase Agreement**”).
6. On the same day, the Court also granted an Interim Distribution and WEPPA Order which, among other things, approved an interim distribution to the Secured Lenders (as defined hereinafter) and declared that pursuant to section 5(5) of the *Wage Earner Protection Program Act*, S.C. 2005, c. 47, s. 1 (the “**WEPPA**”), IMV Inc. and IVT meet the criteria established by section 3.2 of the *Wage Earner Protection Program Regulations*, SOR/2008-222.
7. The Applicants now seek an order extending the Stay period until and including August 18, 2023, and approving the activities and fees of the Monitor and its counsel.
 - (i) amending the ARIO in order to (a) expand the powers of the Monitor and (b) authorize the Applicants, subject to such requirements as are imposed by the Monitor and with the consent of the Secured Lenders, to convey, transfer, assign, lease, or in any other manner dispose of the Property, outside the ordinary course of business, in whole or in part, provided that the price in each case does not exceed \$1,200,000 or \$1,500,000 in the aggregate;
 - (ii) amending the Claims Process Order to authorize the Monitor and the Applicants to stop processing Claims and to dispense them from any further obligation to review the Proofs of Claim filed and value the amounts and terms set out therein for voting and distribution purposes as well as to take no further steps in connection with the Claims Process.
 - (iii) granting a release in favour of the present and former, *de facto* and *de jure*, directors and officers of the Applicants (the “**Directors and Officers**”) as well as a “channeling injunction” to allow the pursuit of claims against the Directors and

Officers as against the director and officer insurance policies held by the Applicants;

(iv) extending the Stay Period until and including October 27, 2023; and

(v) approving the fees and activities of the Monitor and its counsel.

8. The relief sought is within the Court's jurisdiction and discretion to grant under the CCAA and is consistent with the objectives of the CCAA. The Applicants have been proceeding in good faith and with due diligence to implement its restructuring plan for the benefit of all of their stakeholders. The proposed order has been developed in consultation with and is supported by the Monitor and the Secured Lenders.

9. For the reasons set out below, the Applicants submit that the requested relief should be granted.

PART II – THE FACTS

10. The facts are more fully set out in the Affidavit of Brittany Davison sworn September 22, 2023 (the “**September 22 Davison Affidavit**”).² Capitalized terms used herein and not otherwise defined shall have the meanings associated to them in the September 22 Davison Affidavit, unless the context shall otherwise require. Dollar amounts are given in Canadian dollars unless otherwise specified.

PART III – ISSUES

11. The issues before this Court, as addressed below, are whether:

- (i) the Court should expand the powers of the Monitor;
- (ii) the Court should increase of the limit to sell assets outside the ordinary course without Court approval;
- (iii) the Court should authorize the Monitor and the Applicants to stop processing Claims in accordance with the Claims Process Order and to dispense them from any further obligation to review the Proofs of Claim filed and value the amounts and terms set out therein for voting and distribution purposes as well as to take no further steps in connection with the Claims Process;
- (iv) the Court should grant a release in favour of the present and former, *de facto* and *de jure*, directors and officers of the Applicants (the “**Directors and Officers**”) and a “channeling injunction” to allow the pursuit of claims against the Directors and Officers as against the director and officer insurance policies held by the Applicants; and
- (v) the Court should extend the Stay Period until October 27, 2023.

² Affidavit of Brittany Davison sworn September 22, 2023 [*September 22 Davison Affidavit*].

PART IV – THE LAW

A. The Supervising Judge has a Broad Discretionary Power to Make Orders that Further the Remedial Objectives of the CCAA

(i) The Remedial Objectives of the CCAA

12. Canada's insolvency statutes pursue an array of overarching remedial objectives that reflect Parliament's intention that those statutes minimize the wide ranging and potentially catastrophic impacts insolvency can have on the stakeholders of insolvent debtors. As part of this framework, the CCAA generally prioritizes avoiding the social and economic losses resulting from liquidation of an insolvent corporation by allowing it to restructure its business and financial affairs. The CCAA also has the simultaneous objectives of maximizing creditor recovery, preservation of going-concern value where possible, preservation of jobs and communities affected by a debtor's financial distress and enhancement of the credit system generally.³
13. To fulfill these remedial objectives, Parliament chose to keep two legislations where one benefits from significant flexibility to meet the ever-growing challenges of reorganizing debtors in a complex world which required creative and effective decisions. The CCAA has been and remains the engine of this evolution and adaptation that is required to restructure debtors nowadays.⁴
14. A restructuring under the CCAA may take any number of forms, limited only by the creativity of those proposing the restructuring. The courts have developed new and creative remedies to ensure that the objectives of the CCAA are met. Judges are often told opposing parties that if they make a particular order it will be the first time in Canadian jurisprudence. Nonetheless, the orders are made, if the circumstances are appropriate and the orders can be made within the framework and in the spirit of the CCAA legislation.⁵
15. Since the enactment of the CCAA in 1933, restructuring has evolved from the survival of a debtor in an operational state to the survival of the business conducted by a debtor under a different corporate form or ownership, including some form of liquidation of a debtor's

³ *9354-9186 Québec inc v Callidus Capital Corp*, 2020 SCC 10 [Bluberi] [at paras 40-42](#) [Tab 1].

⁴ *Century Services Inc v Canada (AG)*, 2010 SCC 60 [Century Services] [at para 21](#) [Tab 2].

⁵ *Metcalfe & Mansfield Alternative Investments II Corp* (2008), 2008 CanLII 21724 (Ont SCJ) [Metcalfe Ont SCJ] [at para 43](#) [Tab 3]; *Canadian Red Cross Society, Re*, 1998 CanLII 14907 (Ont SCJ) [at para 45](#) [Tab 4].

assets. The latter are referred to as “liquidating CCAAs” and are commonplace in the Canadian restructuring landscape.⁶

16. Such evolution of the concept of restructuring is recognition of the number of stakeholders in a CCAA context that extend beyond the insolvent corporation’s creditors and include its employees, directors, the parties doing business with the insolvent corporation, the general public and the community in which the insolvent corporation operates.⁷
17. The Applicants’ stakeholders include, *inter alia*, their employees, their creditors, their shareholders, their supplier ecosystem, the patients enrolled in the clinical trials and the community of Dartmouth, Nova Scotia.

(ii) The CCAA Court has Been Given a Large Discretionary Power in Furtherance of the Remedial Objectives of the CCAA

18. The most important feature of the CCAA, which “enables it to be adapted so readily to each reorganization” is the broad discretion given to the supervising judges in section 11 of the CCAA to make a variety of orders, as needed. The CCAA is a flexible instrument that is skeletal in nature.⁸
19. As Justice Deschamps writes in *Century*, when deciding on the granting of an order not provided for in the CCAA, “[t]he question is whether the order will usefully further efforts to achieve the remedial purpose of the CCAA”. Even “when an order is sought that does realistically advance the CCAA’s purposes, the ability to make it is within the discretion of a CCAA court”.⁹
20. Section 11 of the CCAA has been interpreted broadly, including “to sanction measures for which there is no explicit authority in the CCAA”. Indeed, as Justice Côté recently held in *Canada v Canada North Group* (with Chief Justice Wagner and Justice Kasirer concurring), the section 11 power is vast and serves a broad purpose.¹⁰

⁶ Bluberi, *supra* note 3, [at paras 41-43, 45-46](#) [Tab 1].

⁷ *Century Services*, *supra* note 4, [at para 60](#) [Tab 2]; *Air Canada, Re*, 2003 CanLII 49366 (Ont SCJ) [at para 13](#) [Tab 5], leave to appeal to the CA refused (2003 CarswellOnt 5213); *Canadian Red Cross Society, Re*, 2000 CanLII 22488 (Ont SCJ) [at para 2](#) [Tab 6].

⁸ *Canada v Canada North Group Inc*, 2021 SCC 30 [*Canada North*] [at para 21](#) [Tab 7].

⁹ *Century Services*, *supra* note 4, [at paras 70-71](#) [Tab 2].

¹⁰ *Canada North*, *supra* note 8, [at paras 20, 31, 176, 178](#) [Tab 7]; Bluberi, *supra* note 3, [at para 65](#) [Tab 1]; *Century Services*, *supra* note 4, [at para 61](#) [Tab 2].

[21] The most important feature of the CCAA - and the feature that enables it to be adapted so readily to each reorganization - is the broad discretionary power it vests in the supervising court (*Callidus Capital*, at paras. 47-48). Section 11 of the CCAA confers jurisdiction on the supervising court to “make any order that it considers appropriate in the circumstances”. This power is vast. As the Chief Justice and Moldaver J. recently observed in their joint reasons, “On the plain wording of the provision, the jurisdiction granted by s. 11 is constrained only by restrictions set out in the CCAA itself, and the requirement that the order made be ‘appropriate in the circumstances’” (*Callidus Capital*, at para. 67). [...]

[Emphasis added]

21. However, while the supervising judge’s discretion under section 11 of the CCAA is vast, it is not unlimited and, to exercise this discretion, the supervising judge must be satisfied that the proposed order sought is appropriate in the circumstances and that the applicant has been acting in good faith and with due diligence.¹¹
22. Whether an order is appropriate will depend upon the unique factual matrix of each case. However, in considering the relevant factual circumstances, the overarching question is whether both the purpose of the order sought and the means it seeks to employ advance the remedial purpose of the CCAA.¹²

(iii) By the Incremental Exercise of Judicial Discretion, CCAA Proceedings Have Evolved to Permit a Variety of Outcomes, Including “Liquidating CCAAs”

23. By the incremental exercise of judicial discretion, courts have been called to innovate by sanctioning measures for which there is no explicit authority in the CCAA.¹³ Notable examples of such innovation even include the appointment of a monitor, but also super-priority charges on the debtor’s assets to secure interim financing, asset sales, third party releases, and the expansion of the powers of the monitor.¹⁴

¹¹ Bluberi, *supra* note 3, [at paras 49-50, 70 \[Tab 1\]](#); Century Services, *supra* note 4, [at paras 59, 69, 70 \[Tab 2\]](#).

¹² Century Services, *supra* note 4, [at paras 59, 70 \[Tab 2\]](#).

¹³ Century Services, *supra* note 4, [at paras 57-58, 61 \[Tab 2\]](#), citing *Metcalfe & Mansfield Alternative Investments II Corp (Re)*, 2008 ONCA 587 [*Metcalfe ON CA*] [at para 44 \[Tab 8\]](#), leave to appeal refused to the SCC refused, [2008 CanLII 46997](#), and *Dylex Ltd, Re*, [1995 CanLII 7370](#) (ONSC) at para 10, Farley J.

¹⁴ Century Services, *supra* note 4, [at para 62 \[Tab 2\]](#); *United Used Auto & Truck Parts Ltd v Aziz*, 2000 BCCA 146 [at para 13](#) (the term “monitor” originates from *Re Northland Properties Ltd* (1988), [69 CBR 266 at 277 \(BC SC\)](#) and was codified by Parliament in 1997) [**Tab 9**]; *Papiers Gaspésia inc (Arrangement relatif à)*, 2004 CanLII 41522 (QCCS) [at para 73](#) (asset sale) [**Tab 10**], leave to appeal to the CA refused, [2004 CanLII 46685](#); 9323-7055 *Québec inc (Arrangement relatif à)*, 2020 QCCA 659 [*Aquadis*] [at para 61](#) (courts may use their discretion to grant the monitor additional powers considered appropriate) [**Tab 11**].

24. In pursuit of the remedial objectives of the legislation, CCAA proceedings have thus evolved to permit outcomes that do not result in the emergence of the debtor in a restructured state by the approval and implementation of a plan of compromise or an arrangement, such as “Liquidating CCAAs”.¹⁵
25. To determine whether this judicial discretion ought or not to be exercised to achieve the CCAA’s purposes, the order sought needs to (i) be appropriate in the circumstances; (ii) proposed by a debtor having acted in good faith; and (iii) advanced with due diligence.¹⁶

B. The Court Should Expand the Powers of the Monitor

26. Canadian Courts have endorsed the trend in case law which recognizes an increasing role for the Monitor in CCAA proceedings and, accordingly, granting it increased powers, where appropriate. Courts can therefore exercise their discretion and grant such additional powers when circumstances warrant it.¹⁷
27. In fact, expanded powers have been granted to the Monitor under various circumstances
28. As at the date hereof, IMV currently employs three (3) employees, which were retained in order to assist with the closing of the Transaction as well as with the sale of other remaining assets.¹⁸
29. The wind down of the clinical trials is completed. Furthermore, the Transaction will close shortly and a transaction is currently being finalized for the sale of IMV’s laboratory assets. There are limited steps to undertake in order to complete the implementation of IMV’s restructuring plan and these CCAA Proceedings.

¹⁵ Bluberi, *supra* note 3, [at paras 42-43 \[Tab 1\]](#)

¹⁶ Bluberi, *supra* note 3, [at paras 49-51 \[Tab 1\]](#); Century Services, *supra* note 4, [at para 70 \[Tab 2\]](#)

¹⁷ CCAA, s [11](#); Aquadis, *supra* note 14, [at paras 61, 68 \[Tab 11\]](#); *Fortress Global Enterprises Inc* (10 January 2020) Que SC Montréal 500-11-057679-199 ([Amended and Restated Initial Order](#)) at para 55 **[Tab 12]**; *Groupe Airmédic Inc et al* (21 July 2023) Que SC Montréal 500-11-062600-230 ([Amended and Restated Initial Order](#)) at para 57 **[Tab 13]**.

¹⁸ September 22 Davison Affidavit, *supra* note 2, at para 46; Fifth Report of the Monitor dated September 22, 2023 [*Monitor’s Fifth Report*] at para 33.

30. Despite the efforts expended by IMV, its Directors and Officers and the various professionals implicated in the restructuring, the consideration received for IMV's business and assets will not be sufficient to repay in full the Secured Lenders. In light of the foregoing, at this time, the Secured Lenders wish to limit costs and expenses to be incurred until the termination of the CCAA Proceedings.¹⁹
31. Rather than terminate the CCAA Proceedings and continue the restructuring under a receivership, it is respectfully submitted that it is appropriate under the circumstances to grant the Monitor certain expanded powers in order to allow it to complete the CCAA Proceedings and deal with any outstanding matter, including to allow the Monitor to exercise, for and of behalf of IMV, all the rights granted to IMV under the ARIO, to negotiate and enter into agreement with respect to IMV's Property and to apply to this Court for and on behalf of IMV in these CCAA Proceedings.²⁰
32. Granting the Monitor the expanded powers requested will limit costs and also limit the implication of the Applicants and their counsel to what is strictly necessary and, accordingly, will further the remedial objectives of the CCAA by maximizing recovery for the Secured Lenders.
33. The Secured Lenders have informed the Monitor that they are agreeable to continuing the CCAA Proceedings in order to finalize any outstanding matters.²¹

C. The Court should Increase the Limit to Sell Assets Outside the Ordinary Course Without Court Approval

34. Over the past weeks, IMV solicited offers for the sale of its laboratory assets, with a view to maximizing recovery for the benefit of its Secured Lenders.²²
35. IMV and the Monitor are currently in advanced discussion with a potential purchaser regarding an asset purchase agreement contemplating a transaction for the sale of IMV's laboratory assets, and it is expected that a definitive agreement will be reached shortly.²³

¹⁹ September 22 Davison Affidavit, *supra* note 2, at para 49.

²⁰ *Ibid*, at paras 49-50.

²¹ *Ibid*, at para 49.

²² *Ibid*, at para 52.

²³ *Ibid*, at para 53; Monitor's Fifth Report, *supra* note 18, at para 34.

36. In order to limit costs and expenses associated with seeking the approval of a transaction from the Court, and given that the transaction contemplated for the sale of the laboratory assets is being negotiated in consultation with the Monitor, the Applicants are asking this Court to amend the ARIO to authorize IMV, subject to such requirements as are imposed by the Monitor and with the consent of the Secured Lenders, to convey, transfer, assign, lease, or in any other manner dispose of the Property, outside the ordinary course of business, in whole or in part, provided that the price in each case does not exceed \$1,200,000 or \$1,500,000 in the aggregate.²⁴
37. Section 36 of the CCAA provides the statutory authority for court approval of the sale of a debtor company's assets outside of the ordinary course of business and also provides six non-exhaustive criteria that a Court must consider.²⁵
38. In deciding whether to grant the authorization, the court is to consider, among other things:
- (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
 - (b) whether the monitor approved the process leading to the proposed sale or disposition;
 - (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
 - (d) the extent to which the creditors were consulted;
 - (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
 - (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.²⁶
39. In the instant case, while an application would not be presented to approve any sale of Property, including the laboratory assets, provided that the price in each case does not exceed \$1,200,000 or \$1,500,000 in the aggregate, the safeguards in place will ensure that the criteria provided by section 36 of the CCAA will be satisfied.²⁷

²⁴ September 22 Davison Affidavit, *supra* note 2, at para 54; Monitor's Fifth Report, *supra* note 18, at para 36.

²⁵ CCAA, s 36.

²⁶ CCAA, s 36 (3).

²⁷ September 22 Davison Affidavit, *supra* note 2, at para 56.

40. In fact, any such sale or disposition with respect to the Property would be subject to the approval of the Secured Lenders and to any restrictions which may be imposed by the Monitor, such that the Secured Lenders will necessarily be consulted and the Monitor will be supportive of the sale or disposition, subject to any conditions or restrictions that it may impose.²⁸
41. Furthermore, should the Court grant the expanded powers sought, the Monitor will be implicated in the discussions, negotiations and closing of any such transaction, thereby ensuring that the process was fair and reasonable.
42. Additionally, at this time, the Secured Lenders are the only parties which currently have an economic interest in these CCAA Proceedings given that the Secured Lenders will not be repaid in full. The Secured Lenders would be required to consent to the sale or disposition and it is in their interest that the consideration to be received is fair and reasonable as it will maximize recovery for their benefit.²⁹
43. Finally, despite the robust SISP conducted by the Monitor, no party indicated an interest to acquire any of the remaining assets of IMV.³⁰ It follows that, at this time, it is in the best interest of all of IMV's stakeholders, including the Secured Lenders, that the assets be monetized in an efficient and expedient manner, without the necessity of incurring important costs which would significantly reduce the portion of the proceeds of the sale or disposition of IMV's remaining assets available for the Secured Lenders.
44. In this context, it is respectfully submitted that it is appropriate in the circumstances to grant the relief sought as it will allow to maximize recovery for the benefit of all of IMV's stakeholders, including the Secured Lenders, without having to incur additional costs of seeking an approval order.³¹

D. The Court Should Amend the Claims Process Order

45. The Applicants are asking this Court to amend the Claims Process Order to authorize the Monitor and the Applicants to stop processing Claims and to dispense them from any further obligation to review the Proofs of Claim filed and value the amounts and terms set out

²⁸ September 22 Davison Affidavit, *supra* note 2, at para 54.

²⁹ *Ibid*, at paras 30, 55; Monitor's Fifth Report, *supra* note 18, at para 36.

³⁰ September 22 Davison Affidavit, *supra* note 2, at paras 25-38

³¹ *Ibid*, at para56.

therein for voting and distribution purposes, as well as to authorize them to take no further steps in connection with the Claims Process.³²

46. 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.³³
47. 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.³⁴
48. 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.”³⁵
49. Given that the Court has the jurisdiction to approve claims processes, it follows that it also has the jurisdiction to relieve the Applicants and the Monitor from any further obligation thereunder.
50. As of the date hereof, each of the respective claims bar dates have expired, including: the Employee Claims Bar Date on June 30, 2023, the Claims Bar Date on July 31, 2023 and the D&O Claims Bar Date on August 29, 2023.³⁶

³² September 22 Davison Affidavit, *supra* note 2, at para 60.

³³ CCAA, ss [11, 12](#); *Re TOYS “R” US (Canada) Ltd*, [2018 ONSC 609](#) [*Toys R Us*] at [para 8](#) [**Tab 14**]; *Roman Catholic Episcopal Corporation of St. John’s (Re)*, [2023 NLSC 5](#) at [para 21](#) [**Tab 15**].

³⁴ CCAA, s [12](#); *Toys R Us*, *supra* note 33, at [para 8](#) [**Tab 14**]; *Timminco Limited (Re)*, 2012 ONSC 506 [*Timminco*] at [para 40](#) [**Tab 16**].

³⁵ *Timminco*, *supra* note 34, at [para 43](#) [**Tab 16**].

³⁶ September 22 Davison Affidavit, *supra* note 2, at para 58.

51. At this stage of the proceedings, it is apparent that there will be no distributions to unsecured creditors given that the Secured Lenders will not be repaid in full. In this context, and in order to avoid incurring unnecessary costs, the Monitor has not proceeded to prepare or send any Notices of Revision or Disallowance in respect of the majority of Claims received to date in the context of the Claims Process.³⁷
52. In light of the foregoing, it is respectfully submitted that the amendments to the Claims Process Order should be granted, as requested.

E. The Release in Favour of the Directors and Officers and the “Channeling Injunction” are Necessary and Appropriate

53. The Applicants are seeking a release in favour of their Directors and Officers of any claim in connection with the Transaction approved by this Court in the context of the CCAA Proceedings, or the Applicants, their assets, business or affairs, except the claims that cannot be released pursuant to subsection 5.1(2) of the CCAA (the “Release”).³⁸

(i) The Court Can Grant Third Party Releases in the Absence of a Plan of Arrangement

54. As outlined above, Canada’s insolvency statutes pursue an array of overarching remedial objectives that reflect Parliament’s intention that those statutes minimize the wide ranging and potentially catastrophic impacts insolvency can have on the stakeholders of insolvent debtors. As part of this framework, the CCAA generally prioritizes avoiding the social and economic losses resulting from liquidation of an insolvent corporation by allowing it to restructure its business and financial affairs. The CCAA also has the simultaneous objectives of maximizing creditor recovery, preservation of going-concern value where possible, preservation of jobs and communities affected by a debtor’s financial distress and enhancement of the credit system generally.³⁹

³⁷ *Ibid*, at paras 30, 55, 59.

³⁸ *Ibid*, at para 61.

³⁹ Bluberi, *supra* note 3, [at paras 40-42](#) [Tab 1].

55. A restructuring under the CCAA may take any number of forms, limited only by the creativity of those proposing the restructuring. The courts have developed new and creative remedies to ensure that the objectives of the CCAA are met. Since the enactment of the CCAA in 1933, restructuring evolved from the survival of a debtor in an operational state to the survival of the business conducted by a debtor under a different corporate form or ownership.⁴⁰
56. Similarly to cases where a plan of compromise or arrangement provides for releases in favour of third parties, releases can be granted in a context where the restructuring is of a “different colour”, including through one or several transaction(s).⁴¹
57. Directors and officers should not be penalized or obtain a lesser protection depending on the restructuring alternative that is chosen. If the Court refuses to grant the Release, it would invite directors and officers to avoid proceeding by way of a transaction, even if it would be more advantageous and in the best interests of the debtor’s stakeholders to do so.
58. Canadian courts have approved releases in favour third parties including *inter alia* directors and officers of debtor corporations as part of approval and vesting orders, reverse vesting orders, distribution orders or termination orders.⁴²
59. While section 5.1 of the CCAA explicitly allows for the compromise of claims against directors and officers in the context of a plan of arrangement, nothing in the CCAA limits the ability of the Court to grant releases to any party on an application brought within CCAA proceedings.⁴³

⁴⁰ Metcalfe Ont SCJ, *supra* note 5, [at para 43 \[Tab 3\]](#); *Canadian Red Cross Society, Re*, 1998 CanLII 14907 (Ont SCJ) [at para 45 \[Tab 4\]](#); Bluberi, *supra* note 3, [at paras 41-43, 45-46 \[Tab 1\]](#).

⁴¹ Metcalfe ON CA, *supra* note 13, [at paras 43, 70-71 \[Tab 8\]](#).

⁴² *Arrangement relatif à Nemaska Lithium inc* (15 October 2020) Que SC Montréal 500-11-057716-199 ([Approval and Vesting Order](#)) at para 41 **[Tab 17]**, leave to appeal to the CA refused, [2020 QCCA 1488](#), leave to appeal to the SCC refused 2021 CarswellQue 4589 (SCC), leave to appeal to the SCC refused 2021 CarswellQue 5301 (SCC); *Green Relief Inc, Re*, 2020 ONSC 6837 [*Green Relief* [at paras 23, 25-28 \[Tab 18\]](#)]; *Golf Town Canada Holdings Inc, Re* (29 March 2018), Ont SCJ, Toronto CV-16-11527-00CL ([CCAA Termination Order](#)) at para 14, Conway J **[Tab 19]**; *Cinram International Inc, Re* (12 October 2012), Ont SCJ, Toronto CV-12-9767-00CL ([Administrative Reserve / Distribution / Transition Order](#)) at para 29, Morawetz J **[Tab 20]**.

⁴³ *Green Relief*, *supra* note 42, [at paras 25-26 \[Tab 18\]](#); *Fraser Papers Inc, Re*, 2012 ONSC 4882 [at para 51](#), Morawetz J **[Tab 21]**; Bluberi, *supra* note 3, [at para 67 \[Tab 1\]](#).

(ii) The Court Can Grant a “Channeling Injunction”

60. In the context of a plan of compromise or arrangement, Canadian Courts routinely approve releases which include “channeling injunctions”. Channeling injunctions are a means to safeguard the rights of a person whose claims is released to recover an amount regarding the liability of a released party or a claim against them under an insurance policy covering such released party. In other words, channeling injunctions “channel financial recovery to available insurance proceeds”.⁴⁴
61. As detailed herein, 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 grant a “channeling injunction”.⁴⁵ While not as commonly as in the context of a plan of compromise or arrangement, Courts have also granted channeling injunctions when approving releases outside of the context of a plan of compromise or arrangement where insurance policies were in place and released claims could be asserted as against the proceeds of the insurance policies.⁴⁶
62. In light of the foregoing, it is respectfully submitted that this Court has the jurisdiction to grant the “channeling injunction” requested.

(iii) The Potential Claims Against the Directors and Officers

63. On May 9, 2023, this Court entered Claims Process Order with a view to identify and quantify the universe of potential claims against, *inter alia*, the Directors and Officers. The Claims Process was conducted by the Monitor in accordance with the procedure set forth in the Claims Process Order.⁴⁷
64. As mentioned above, as at the date hereof, the D&O Claims Bar Date, which was set for August 29, 2023 (i.e. more than 100 days following the date on which the Claims Process Order was entered), has expired and a total of seven (7) claimants filed claims against the Directors and Officers (the “**D&O Claims**”), including the Marker Claim.⁴⁸

⁴⁴ *Trican Well Service Ltd v Delphi Energy Corp*, 2020 ABCA 363 [at para 22](#) [Tab 22].

⁴⁵ CCAA, s 11.

⁴⁶ *Arrangement relatif à Groupe Atis Inc et al*, (8 December 2021) Que SC Montréal 500-11-059536-215 ([Order](#)) at para 9 [Tab 23]; *Green Relief Inc et al, Re* (9 November 2020) Ont SCJ Toronto CV-20-00639217-00CL ([Approval and Vesting Order](#)) at para 24 [Tab 24].

⁴⁷ September 22 Davison Affidavit, *supra* note 2, at paras 7, 39, 68.

⁴⁸ *Ibid*, at paras 40, 58, Exhibit A, Exhibit B.

65. The Marker Claim is an equity claim that could allegedly exceed an amount of US\$50 million, although it has not been quantified by the claimants at this time. Despite the fact that the claimants under the Marker Claim had more than 100 days to file their claim in the context of the Claims Process, the Marker Claim is not substantiated by any documents and is limited to vague allegations *inter alia* of misrepresentation, conspiracy and oppression on the part of the Directors and Officers. Most, if not all, of the allegations against the Directors and Officers contained in the Marker Claims appear *prima facie* unfounded in light of the statements contained in IMV's 2021 Financial Statements and 2022 Financial Statements.⁴⁹
66. Furthermore, the Directors and Officers are of the view that the allegations contained in the Marker Claim are unfounded and intend to vigorously contest the Marker Claim.⁵⁰
67. It is respectfully submitted that the Marker Claim represents nothing more than an ultimate attempt by disgruntled shareholders to hold the Directors and Officers liable for the insolvency of the Applicants.
68. The other D&O Claims are equity claims which were filed without any allegations in respect of the Directors and Officers.⁵¹

(iv) The Court Should Grant the Release in Favour of the Directors and Officers

69. The criteria for the Court to determine whether it is appropriate to grant such releases are the same as those established for the issuance of a third party release in the context of a plan of arrangement, as well as a consideration of the quality of the claims which are proposed to be released.⁵²

⁴⁹ *Ibid*, at paras 40, 43, 58, Exhibit B.

⁵⁰ *Ibid*, at para 42.

⁵¹ September 22 Davison Affidavit, *supra* note 2, at para 40, Exhibit A.

⁵² Green Relief, *supra* note 42, [at paras 27-29 \[Tab 18\]](#).

70. Releases of third parties, such as the directors and officers of a debtor, are appropriate in circumstances where the releases protect the debtor against potential contribution and indemnity claims and facilitates the resolution of matters without delay or further depletion of estate assets. The importance of such releases has recently been reiterated by the Supreme Court of Canada.⁵³
71. Since the commencement of the CCAA Proceedings, the Directors and Officers of each of the Applicants have continuously worked towards maximizing the value of IMV's business and assets and, in turn, the recovery for its creditors.⁵⁴
72. Given the outcome of the SISP, there will not be sufficient funds to finance a plan of compromise or arrangement, including one that would provide for customary releases in favour of the Directors and Officers.⁵⁵
73. IMV has a legal board of directors a majority of independent international caliber members, who have been meeting on a weekly basis – and sometimes on short notice – throughout the CCAA Proceedings, fully engaged with management and provided continuous support in connection with the restructuring, including the SISP. Their involvement has been instrumental in maximizing the value of the business and assets of IMV.⁵⁶
74. Similarly, the officers of each of the Applicants have worked tirelessly throughout these CCAA Proceedings, the whole for the benefit of all of IMV's stakeholders, including the employees and the patients in IMV's clinical trials.⁵⁷
75. Furthermore, the Directors and Officers will not consent to the release and discharge of the Court-ordered charge in their favour without the Directors and Officers having been released from the potential claims covered by their indemnity as the payment of their indemnity, as the case may be, would no longer be secured over the assets of IMV.⁵⁸

⁵³ *Nortel Networks Corporation (Re)*, 2010 ONSC 1708 [at para 81](#), Morawetz J [Tab 25]; *Desjardins Cabinet de services financiers inc c Asselin*, 2020 CSC 30 [dissent of justices Côté, Moldaver and Rowe not contradicted by the majority] [at para 272](#) [Tab 26].

⁵⁴ September 22 Davison Affidavit, *supra* note 2, at para 62.

⁵⁵ *Ibid*, at para 63.

⁵⁶ *Ibid*, at para 64.

⁵⁷ September 22 Davison Affidavit, *supra* note 2, at para 65.

⁵⁸ *Ibid*, at para 67.

76. No person will be materially prejudiced by the Release: as outlined previously, there are no outstanding claim against the Released Parties.
77. Furthermore, through the “channeling injunction, the Release safeguards the rights of a person to recover an amount regarding the liability of the Directors and Officers or a claim against them under any director and officer insurance policy. Therefore, notwithstanding the Release, parties alleging claims against the Directors and Officers will be entitled to seek an indemnity from the Directors and Officers’ insurers and consequently, the Release does not materially prejudice any creditor of the Directors and Officers.
78. In light of the foregoing, it is respectfully submitted that the Release sought is appropriate and fair in the circumstances, is rationally related to the restructuring and the CCAA Proceedings and that the Directors and Officers benefit from a release which they would customarily receive as part of a plan in consideration for their involvement throughout these CCAA Proceedings, so as to enable them to turn the page once these CCAA Proceedings will have been completed.

F. The Court Should Extend the Stay Period Until October 27, 2023

79. On May 1st, 2023, the Court granted a Stay of proceedings in favour of IMV and its Directors and Officers until and including May 5, 2023, which was subsequently extended on several occasions, including, most recently, until and including September 29, 2023. The Applicants now seek the extension of such Stay Period until and including October 27, 2023.
80. 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.⁵⁹
81. 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 SISP, where the SISP is the most efficient way to maximize the value for stakeholders.⁶⁰

⁵⁹ CCAA, s [11.02](#).

⁶⁰ *North American Tungsten Corporation Ltd (Re)*, 2015 BCSC 1376 at [paras 26-28](#) [Tab 27].

82. 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.”⁶¹
83. In the present case, the Applicants have implemented their restructuring with good faith and due diligence since the issuance of the Initial Order.⁶²
84. The extension of the Stay Period is necessary and appropriate in the circumstances in order to allow for the closing of the Transaction as well as to allow the Monitor to sell IMV’s remaining assets as well as to complete the CCAA Proceedings, including dealing with any matters remaining to be completed in respect of the WEPPA.⁶³
85. IMV has sufficient funds to get through the Stay Period, including a provision for the payments under the KERP.⁶⁴
86. 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.⁶⁵
87. 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 October 27, 2023.

PART V – NATURE OF THE ORDER SOUGHT

88. The Applicants therefore request the issuance of an order substantially similar to the Proposed Order.

⁶¹ *Ibid*, at [para 29](#) [Tab 27].

⁶² September 22 Davison Affidavit, *supra* note 2, at para 74.

⁶³ *Ibid*, at para 72; Monitor’s Fifth Report, *supra* note 18 at para 42.

⁶⁴ September 22 Davison Affidavit, *supra* note 2, at para 73; Monitor’s Fifth Report, *supra* note 18, at para 43.

⁶⁵ September 22 Davison Affidavit, *supra* note 2, at para 74.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 27th day of September, 2023:

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SCHEDULE A
INDEX OF AUTHORITIES

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1.	<i>9354-9186 Québec inc v Callidus Capital Corp</i> , 2020 SCC 10
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3.	<i>Metcalfe & Mansfield Alternative Investments II Corp</i> (2008), 2008 CanLII 21724 (Ont SCJ)
4.	<i>Canadian Red Cross Society, Re</i> , 1998 CanLII 14907 (Ont SCJ)
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18.	<i>Green Relief Inc, Re</i> , 2020 ONSC 6837

19.	<i>Golf Town Canada Holdings Inc, Re</i> (29 March 2018), Ont SCJ, Toronto CV-16-11527-00CL (CCAA Termination Order), Conway J
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25.	<i>Nortel Networks Corporation (Re)</i> , 2010 ONSC 1708
26.	<i>Cabinet de services financiers inc c Asselin</i> , 2020 CSC 30
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