

**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 MONITOR  
(Approval of the Monitor’s Fees and Activities)**

July 16, 2023

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**TO: THE SERVICE LIST (ATTACHED)**

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**PART I - OVERVIEW**

1. FTI Consulting Canada Inc. (“**FTI**”), in its capacity as Monitor of the Applicants (the “**Monitor**”) in the above-noted proceedings (the “**CCAA Proceedings**”), seeks approval of: (a) the Monitor’s fees and disbursements for the period from May 1, 2023 to July 9, 2023; (b) the fees and disbursements of the Monitor’s legal counsel, Stikeman Elliott LLP (“**Stikeman**”) for the period from April 1, 2023 to June 29, 2023 (both periods are collectively referred to as, the “**Period**”); and (c) the Pre-Filing Report of the Proposed Monitor dated April 28, 2023 (the “**Pre-Filing Report**”), the First Report of the Monitor dated May 4, 2023 (the “**First Report**”) and the Second Report of the Monitor dated July 13, 2023 (the “**Second Report**”, together with the Pre-Filing Report and the First Report, the “**Monitor’s Reports**”), and the conduct and activities of the Monitor referred to therein.

2. The fees and disbursements of the Monitor and Stikeman resulting from the work described herein are a function of the complex circumstances of the CCAA Proceedings and the effort required to advance the interests of the Applicants and their stakeholders.

3. The Monitor served the Second Report on July 13, 2023, which summarizes the activities of the Monitor and Stikeman during the Period, as well as two affidavits detailing the fees incurred.

4. In the circumstances of the CCAA Proceedings, the fees and disbursements of the Monitor and Stikeman for the Period are fair and reasonable. In addition, the Monitor has carried out its activities in a manner consistent with the Initial Order and as prescribed by the *Companies' Creditors Arrangement Act* (Canada) (the "**CCAA**"). It is respectfully submitted that this Court should approve (a) the Monitor's Reports and the activities of the Monitor referred to therein; and (b) the fees and disbursements of the Monitor and Stikeman.

## **PART II - FACTS**

5. The facts with respect to this motion are more fully set out in the Second Report. Capitalized terms used herein but not otherwise defined have the meanings given to them in the Second Report. Dollar amounts referred to herein are in Canadian dollars.

### **A. Parties to the CCAA Proceeding**

6. On May 1, 2023, IMV Inc. ("**IMV**"), and Immunovaccine Technologies Inc. ("**IVT**") and IMV USA Inc. ("**IMV USA**" and together with IMV and IVT, the "**Applicants**" or the "**IMV Group**") sought and obtained an initial order (as amended and restated on May 5, 2023, the "**Initial Order**"), which, among other things, appointed FTI as Monitor of the IMV Group.<sup>1</sup>

7. The Monitor retained Stikeman as its legal counsel in the CCAA Proceedings.<sup>2</sup>

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<sup>1</sup> Second Report of the Monitor dated July 13, 2023 [**Second Report**] at para 1.

<sup>2</sup> Second Report at para 12.

**B. Overview of the Fees and Disbursements**

8. The Monitor and Stikeman have been paid their fees and disbursements at their standard rates and charges by the Applicants from time to time, in accordance with paragraph 32 of the Initial Order, as part of the costs of the CCAA Proceedings.<sup>3</sup>

9. The Monitor and Stikeman have maintained records of their professional time and costs. The Monitor now requests approval of its fees and disbursements and the fees and disbursements of Stikeman for the Period.<sup>4</sup>

10. The fees of the Monitor for the period of May 1, 2023 to July 9, 2023 are \$865,127.50, disbursements in the amount of \$86,071.49, Harmonized Sales Tax (“HST”) in the amount of \$142,680.12, with total fees and disbursements of the Monitor for the period of May 1, 2023 to July 9, 2023 of \$1,093,879.11, as more particularly described in the Affidavit of Jeffrey Rosenberg sworn July 13, 2023 (the “**Rosenberg Affidavit**”), a copy of which is attached to the Second Report as Appendix “C”.<sup>5</sup>

11. The fees of the Monitor’s counsel from May 1, 2023 to June 29, 2023 are \$104,225.25, disbursements in the amount of \$2,926.01, HST in the amount of \$13,549.29 with total fees and disbursements of the Monitor’s counsel for the period from May 1, 2023 to June 29, 2023 of \$120,700.55, as more particularly described in the Affidavit of Maria Konyukhova, sworn July 13, 2023 (the “**Konyukhova Affidavit**”, together with the Rosenberg Affidavit, the “**Fee Affidavits**”), a copy of which is attached to the Second Report as Appendix “D”.<sup>6</sup>

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<sup>3</sup> Second Report at para 36.

<sup>4</sup> Second Report at para 37.

<sup>5</sup> Second Report at para 38.

<sup>6</sup> Second Report at para 39.

12. The Monitor and Stikeman billed amounts at each firm's standard/regular hourly rates, which are consistent with the hourly rates charged by other firms of comparable size and expertise for the provision of similar services regarding significant and complex commercial restructuring and accounting matters.<sup>7</sup>

13. In the Monitor's professional judgement, the accounts requested to be approved on this motion are fair and reasonable in the circumstances of the CCAA Proceedings.<sup>8</sup>

**C. The Activities of the Monitor and Stikeman**

14. During the Period, the Monitor fulfilled the role of Monitor as such role is described in the Initial Order and prescribed by the CCAA.

15. Since the date of the First Report, the Monitor has undertaken the following activities:

- (a) assisting the IMV Group in considering their restructuring options;
- (b) assisting the IMV Group in discussions with key stakeholders, including suppliers, creditors and employees, related to the CCAA Proceedings and responding to requests for information from certain of such parties;
- (c) supervising and assisting with activities related to the sale and investment solicitation process with FTI Capital Advisors – Canada ULC;
- (d) supervising and assisting with activities related to the claims process, including engaging with claimants who have submitted proofs of claim and providing a copy of the Creditors' Instructions to any person upon becoming aware of any

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<sup>7</sup> Second Report, Appendix "C", Affidavit of Jeffrey Rosenberg sworn July 13, 2023 [**Rosenberg Affidavit**] at paras 9-11; Second Report, Appendix "D", Affidavit of Maria Konyukhova sworn July 13, 2023 [**Konyukhova Affidavit**] at paras 11-12.

<sup>8</sup> Second Report at para 40.

circumstances giving rise to a Restructuring Claim (each as defined in the Claims Procedure Order);

- (e) reviewing updated consolidated cash flow projections of the IMV Group's receipts and disbursements and information related thereto provided by the IMV Group; and
- (f) reporting to the Court on the status of the CCAA Proceedings.<sup>9</sup>

16. Stikeman has advised the Monitor and assisted with its involvement in the above activities in the CCAA Proceedings.<sup>10</sup>

### **PART III - ISSUES**

17. This motion presents the following issues:

- (a) Should this Court approve the fees and disbursements of the Monitor and Stikeman?
  - (i) Does this Court have the jurisdiction to pass the accounts of the Monitor and Stikeman?
  - (ii) Are the accounts of the Monitor and Stikeman fair and reasonable?
- (b) Should this Court approve the Monitor's Reports and the conduct and activities of the Monitor referred to therein?

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<sup>9</sup> Rosenberg Affidavit at para 7.

<sup>10</sup> Konyukhova Affidavit at para 9.

## **PART IV - LAW AND ANALYSIS**

### **A. Jurisdiction of this Court to Pass the Accounts**

18. The jurisdiction of this Court to pass the accounts is confirmed at paragraph 32 of the Initial Order, which provides that “The Monitor and its legal counsel shall pass their accounts from time to time before a judge of this court or a referee appointed by a judge.”<sup>11</sup>

### **B. The Fair and Reasonable Test for Approval of Accounts**

19. The test on a motion to pass accounts is to consider the “overriding principle of reasonableness”.<sup>12</sup> The overall value contributed by the Monitor and its counsel is the predominate consideration in assessing the reasonableness of the accounts.<sup>13</sup>

20. The Court does not engage in a “docket-by-docket or line-by-line assessment” of the accounts, as minute details of each element of a professional’s services may not be instructive when looked at in isolation.<sup>14</sup> Rather, the focus of the fair and reasonable assessment should be on what was accomplished, not how much time it took.<sup>15</sup>

21. In this case, it is not necessary or desirable for the Court to engage in a review of each individual entry to determine whether the Monitor’s and Stikeman’s accounts are fair and reasonable. There has been adequate disclosure of the activities of the Monitor and Stikeman in the Reports and throughout the CCAA Proceedings. Based on the record filed in support of the motion and the degree of Court oversight and involvement throughout the CCAA Proceedings, it

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<sup>11</sup> Amended and Restated Initial Order issued May 5, 2023 [**Initial Order**] at para 32.

<sup>12</sup> *Nortel Networks Inc*, [2022 ONSC 6680](#) [**Nortel Inc**] at [para 10](#).

<sup>13</sup> *Re Nortel Networks Corporation et al*, [2017 ONSC 673](#) [**Nortel Corp**] at [paras 15, 21](#).

<sup>14</sup> *Nortel Inc*, *supra* note 12; see also *Bank of Nova Scotia v Diemer*, [2014 ONCA 851](#) [**Diemer**] at [para 45](#).

<sup>15</sup> *Diemer*, *ibid*.



is respectfully submitted that the Court can and should determine that the Monitor's and Stikeman's accounts are fair and reasonable.

**(i) Factors to Be Considered**

22. The test to be applied in determining whether to approve the Monitor's and Stikeman's fees is whether they are fair and reasonable. Any challenges to a court officer's accounts are evaluated based on specific objections, as "without some specified principled objection, it would be inappropriate to reduce the fees of Court officers based on the suggestion that they are too high".<sup>16</sup>

23. To aid in the determination of whether a court-appointed officer's fees are fair and reasonable, the Ontario Court of Appeal has recognized the following list of non-exhaustive factors:<sup>17</sup>

- (a) the nature, extent and value of the assets being handled;
- (b) the complications and difficulties encountered;
- (c) the degree of assistance provided by the company, its officers or its employees;
- (d) the time spent;
- (e) the Monitor's knowledge, experience and skill;
- (f) the diligence and thoroughness displayed;
- (g) the responsibilities assumed;
- (h) the results achieved; and
- (i) the cost of comparable services when performed in a prudent and economical manner.

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<sup>16</sup> *Re Tiger Brand Knitting Co*, [2006 CarswellOnt 9983](#) at paras 14-15 (Ont SCJ).

<sup>17</sup> *Diemer*, *supra* note 14 at [para 33](#); see also *Triple-I Capital Partners Limited v 12411300 Canada Inc*, [2023 ONSC 3400](#) at [para 23](#).

24. These factors are not intended to be an exhaustive list and other factors may be material in any particular case.<sup>18</sup>

25. The CCAA Proceedings have involved complex issues and a multitude of competing interests from various groups of stakeholders. The efforts of the Monitor and Stikeman in assisting the Applicants have had a material, positive impact on advancing the interests of the Applicants and their stakeholders, and the CCAA Proceedings at large.

**(ii) Time Incurred**

26. The Monitor and Stikeman have named the individual professionals who have performed necessary work to advance the CCAA Proceedings during the Period, along with their position, hourly billing rate, total number of hours worked and the total associated professional fees.<sup>19</sup>

27. The time spent, and thus the fees and disbursements of the Monitor and Stikeman resulting from their activities, are commensurate with the significant role and responsibilities and activities undertaken. The work has been undertaken with a view to advancing the interests of the IMV Group having regard to the complications and challenges that have confronted the Monitor, to maximize the amounts available for distribution to creditors, and to best position the IMV Group to emerge from the CCAA Proceedings as a going concern.

28. In addition to this Court's direct knowledge of the Monitor's and Stikeman's activities, the information necessary for this Court to assess the reasonableness of the time spent and the fees and disbursements of the Monitor and Stikeman during the Period has been detailed in the Monitor's Reports.

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<sup>18</sup> *Nortel Corp*, *supra* note 13 at [para 14](#).

<sup>19</sup> Rosenberg Affidavit at para 8 and Exhibit "B"; Konyukhova Affidavit at para 8 and Exhibit "B".

**(iii) Knowledge, Experience and Skill**

29. The Monitor and Stikeman have significant knowledge, experience and skill in complex restructuring matters. The Monitor and its counsel have acted in this capacity in some of Canada's largest and most complicated restructuring mandates. The lead professionals involved are all highly regarded and possess significant expertise in complex and special situations.

**(iv) Diligence and Thoroughness Displayed**

30. The breadth of matters detailed in the Monitor's Reports demonstrate the diligence and thoroughness displayed by the Monitor and Stikeman.

**(v) Responsibilities Assumed**

31. The Monitor, with the assistance of Stikeman, carried out extensive activities during the Period, as detailed in the Second Report.<sup>20</sup>

32. The more significant responsibilities that the Monitor has assumed include: (a) assisting the IMV Group in considering their restructuring options; assisting the IMV Group in discussions with key stakeholders, including suppliers, creditors and employees, related to the CCAA Proceedings and responding to requests for information from certain of such parties; (c) supervising and assisting with activities related to the sale and investment solicitation process with FTI Capital Advisors – Canada ULC; (d) supervising and assisting with activities related to the claims process, including engaging with claimants who have submitted proofs of claim and providing a copy of the Creditors' Instructions to any person upon becoming aware of any circumstances giving rise to a Restructuring Claim (each as defined in the Claims Procedure

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<sup>20</sup> Second Report at para 12.

Order); (e) reviewing updated consolidated cash flow projections of the IMV Group's recipients and disbursements and information related thereto provided by the IMV Group; and (f) reporting to the Court on the status of the CCAA Proceedings.<sup>21</sup>

**(vi) Results achieved**

33. The efforts of the Monitor and its counsel during this Period of the CCAA Proceeding were integral to advancing the CCAA Proceedings. The Monitor's contribution to the completion of several critical steps in the Applicants' restructuring, as detailed in the Second Report.<sup>22</sup>

34. When the fees and disbursements of the Monitor and Stikeman are viewed in the context of the progress made in the CCAA Proceedings to date, it is respectfully submitted that the accounts are fair and reasonable.

**(vii) Cost of Comparable Services**

35. The Monitor's and Stikeman's professional fees and disbursements are comparable to the rates charged by other professional firms of comparable size and expertise for the provision of similar services regarding significant and complex commercial restructuring matters.

36. Accordingly, it is respectfully submitted that a consideration of the factors articulated by the courts supports the conclusion that the remuneration of the Monitor and Stikeman is fair and reasonable and their fees and disbursements for the Period should be approved.

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<sup>21</sup> *Ibid.*

<sup>22</sup> Second Report at para 12.

## E. Monitor's Reports and Activities

37. A request to approve a monitor's report "is not unusual".<sup>23</sup> There are policy and practical reasons for the Court to approve the Monitor's activities and provide a level of protection for the Monitor during the CCAA Proceedings. Specifically, Court approval:

- (a) allows the Monitor to move forward with next steps in the CCAA Proceedings;
- (b) brings the Monitor's activities before the Court;
- (c) allows an opportunity for the concerns of the stakeholders to be addressed, and any problems to be rectified;
- (d) enables the Court to satisfy itself that the Monitor's activities have been conducted in prudent and diligent manners;
- (e) provides protection for the Monitor not otherwise provided by the CCAA; and
- (f) protects the creditors from the delay and distribution that would be caused by:
  - i. re-litigation of steps taken to date, and
  - ii. potential indemnity claims by the Monitor.<sup>24</sup>

38. The form of the proposed order, with respect to approval of the Monitor's Reports and activities, is consistent with the language used in *Target*<sup>25</sup> and subsequent proceedings.<sup>26</sup>

39. In the present case, the Monitor's Reports and the conduct and activities of the Monitor referred to therein should be approved.

40. The Monitor has acted responsibly and carried out its activities in a manner consistent with the provisions of the CCAA and in compliance with the Initial Order. No party has put forward evidence to the contrary. It is respectfully submitted that in the circumstances, the Court should

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<sup>23</sup> *Re Target Canada Co*, [2015 ONSC 7574](#) at para 2 [*Target*].

<sup>24</sup> *Target*, *ibid* at [para 22](#).

<sup>25</sup> *Target*, *ibid* at [paras 7 and 26](#).

<sup>26</sup> See, for example: [Re Clover Leaf Foods](#) (29 September 2020), Toronto CV-20-00641220-00CL (Ont Sup Ct [Commercial List]) Order (Re Approval of Monitor's Activities and Fees and for Stay Extension) at para 3.

respect the good faith decisions of the Monitor and its legal counsel related to the CCAA Proceeding.

**PART V - RELIEF SOUGHT**

41. For these reasons, the Monitor requests an Order approving (a) the Monitor's Reports and the conduct and activities of the Monitor referred to therein; and (b) the fees and disbursements incurred during the Period, being:

- (a) For the Monitor, \$1,093,879.11, inclusive of disbursements and HST; and
- (b) For Stikeman, \$120,700.55, inclusive of disbursements and HST.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 16<sup>th</sup> day of July, 2023.



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**SCHEDULE “A” – LIST OF AUTHORITIES**

1. *Nortel Networks Corp (Re)*, [2017 ONSC 673](#).
2. *Nortel Networks Inc*, [2022 ONSC 6680](#).
3. *Bank of Nova Scotia v Diemer*, [2014 ONCA 851](#).
4. *Re Tiger Brand Knitting Co*, [2006 CarswellOnt 9983](#) (Ont SCJ).
5. *Re Target Canada Co*, [2015 ONSC 7574](#).
6. *Re Clover Leaf Foods* (29 September 2020), Toronto CV-20-00641220-00CL (Ont Sup Ct [Commercial List] Order (Re Approval of Monitor’s Activities and Fees and for Stay Extension)).

**IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED  
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF IMV INC. ET AL.**

Hfx No. 523334

**SUPREME COURT OF NOVA SCOTIA**

**FACTUM OF THE MONITOR**

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