Court File No. CV-22-00683056-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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 SPROUTLY, INC. and TORONTO HERBAL REMEDIES INC.

(each an "**Applicant**" and collectively, the "**Applicants**")

FACTUM OF THE APPLICANTS

June 23, 2022

Thornton Grout Finnigan LLP
3200 – 100 Wellington Street West
TD West Tower, Toronto-Dominion Centre
Toronto, ON M5K 1K7

Rebecca L. Kennedy (LSO# 61146S)
Email: rkennedy@tgf.ca

Leanne M. Williams (LSO# 41877E)
Email: lwilliams@tgf.ca

Adrienne Ho (LSO# 68439N)
Email: aho@tgf.ca

Tel: 416-304-1616
Fax: 416-304-1313

Lawyers for the Applicants

TO: THIS HONOURABLE COURT
AND TO: THE SERVICE LIST

TABLE OF CONTENTS

PART I - OVERVIEW

1. Toronto Herbal Remedies Inc. ("**THR**", and jointly with Sproutly, Inc., the "**Applicants**") is engaged in the production, processing and sale of cannabis products at a facility in Toronto, Ontario. Sproutly, Inc. has no assets other than 100% of the shares of THR.

2. The Applicants require immediate interim financing and the protections afforded under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**")[1] in order to maintain the *status quo* and obtain the breathing room required to run a sales process for the benefit of their stakeholders.

3. As such, the Applicants seek creditor protection and other relief pursuant to an order (the "**Initial Order**") under the CCAA, among other things:

   (a) declaring that the Applicants are parties to which the CCAA applies;

   (b) appointing BDO Canada Limited (the "**Proposed Monitor**") as Monitor in these CCAA proceedings to monitor the Applicants' business and affairs;

   (c) staying all proceedings taken or that may be taken in respect of the Applicants, their directors and officers, or the Proposed Monitor until July 4, 2022, subject to further Order of the Court;

   (d) approving the Applicants' ability to borrow up to the maximum principal amount of $160,000 under a debtor-in-possession credit facility (the "**DIP Facility**") from 0982244 B.C. Ltd., operating as Isle of Mann Property Group (the "**DIP Lender**")

---

[1] R.S.C. 1985, c. C-36 (the "**CCAA**").

to finance their working capital requirements and other general corporate purposes, post-filing expenses and costs; and

(e) granting the Administration Charge, DIP Charge, and Directors' Charge (each term as defined below and collectively, the "**Super-Priority Charges**").

PART II - FACTS

4. Capitalized terms not otherwise defined herein are defined in the affidavit of Craig Loverock sworn June 22, 2022 (the "**Loverock Affidavit**").[2] The facts of this Application are more fully described in the Loverock Affidavit.

5. Unless otherwise stated herein, monetary amounts are stated in Canadian dollars.

The Applicants' Business, Operations, and Corporate Structure

6. Sproutly, Inc. was incorporated on January 17, 2017 under the *Canada Business Corporations Act* ("**CBCA**") and maintains its registered address at 10th Floor – 595 Howe Street, Vancouver, British Columbia.[3]

7. Sproutly Canada, the ultimate parent of the Applicants and who is not an applicant in these proceedings, was incorporated as "Stone Ridge Exploration Corp." ("**Stone Ridge**") in 2012. In 2018, Stone Ridge effected a plan of arrangement under the CBCA, which included a reverse takeover of Stone Ridge by Sproutly, Inc. Stone Ridge changed its name

---

[2] Affidavit of Craig Loverock sworn June 22, 2022. Applicants' Application Record dated June 22, 2022 at Tab 2 ["**Loverock Affidavit**"].

[3] Loverock Affidavit at para. 10.

to "Sproutly Canada, Inc." and Sproutly, Inc. became a wholly owned subsidiary of now Sproutly Canada.[4]

8. Sproutly, Inc. owns 100 per cent of the shares of THR.[5] THR was incorporated on January 17, 2013 under the *Business Corporations Act* (Ontario), and maintains its registered office at 70 Raleigh Ave, Toronto, Ontario.[6]

9. THR is engaged in the production, processing and sale of cannabis products. It holds the Applicants' primary assets, which include the Real Property (as defined below), various equipment and inventory, and the Health Canada license permitting the processing, cultivation, and sale of cannabis in accordance with the Cannabis Act and the Cannabis Regulations (the "**Cannabis License**").[7]

10. THR owns a 15,913 square foot production facility (the "**THR Facility**") located at 64-70 Raleigh Avenue, Toronto, Ontario (the "**Real Property**"). The THR Facility was built to cultivate pharmaceutical grade cannabis. It has 12 grow rooms, and approximately 10,528 square feet dedication to production support.[8]

11. THR's Cannabis License, in respect of the THR Facility, permits THR to possess, produce, and sell cannabis. The Cannabis License is currently due to expire on November 26, 2026.[9]

---

[4] Loverock Affidavit at para. 9.

[5] Loverock Affidavit at para. 6.

[6] Loverock Affidavit at para. 11.

[7] Loverock Affidavit at para. 5.

[8] Loverock Affidavit at para. 13.

[9] Loverock Affidavit at para. 14.

12. THR is also registered under the Saskatchewan Liquor and Gaming Authority to supply cannabis to the Saskatchewan market from the Real Property. [10] THR has also entered into supply agreements with six provinces: British Columbia, Saskatchewan, Manitoba, Alberta, New Brunswick and Ontario, through the applicable provincial wholesaler or liquor and gaming authorities, to supply dried flower products.[11]

13. At this time, THR is not growing or producing cannabis products; however, cannabis remains at the licenced facility. [12]

14. Presently, THR has 2 employees whereas Sproutly has 2 employees and 1 consultant. The employees are not unionized and do not maintain a pension plan.[13]

The Applicants' Secured Creditors

15. Sproutly, Inc. has no secured creditors, and there are no security interests registered pursuant to the *Personal Property Security Act* in Ontario and British Columbia against it.[14]

16. THR has three secured creditors: the DIP Lender, Infusion Biosciences Inc. ("**Infusion**"), and Her Majesty in Right of Ontario Represented by the Minister of Finance ("**Minister of Finance**", and together with the DIP Lender and Infusion, the "**Secured Creditors**").[15]

---

[10] Loverock Affidavit at para. 16.

[11] Loverock Affidavit at para. 19.

[12] Loverock Affidavit at para. 5.

[13] Loverock Affidavit at para. 17.

[14] Loverock Affidavit at paras. 24 and 29.

[15] Loverock Affidavit at para. 25.

The DIP Lender

17. The DIP Lender has extended loans totalling $4.5 million to THR.[16] The DIP Lender's security package includes a first in priority mortgage registered against the Real Property in the amount of $4.5 million as well as a PPSA security interest. [17] The amount outstanding on the mortgage is $3,596,130.60, with daily interest accruing at $1,127.40.[18]

18. The DIP Lender had previously commenced power of sale of proceedings against THR to obtain vacant possession of the THR Facility. THR defended this action. Though efforts made by the Applicants, the DIP Lender is now supportive of these CCAA proceedings and has agreed to provide the DIP Facility.[19]

Infusion Biosciences Inc.

19. Infusion had agreed to lend $1 million to Sproutly Canada. Infusion's security package includes a guarantee from THR, a registered security interest, and a second in priority mortgage. Infusion subsequently agreed to lend an additional $855,000 to Sproutly Canada. Infusion obtained additional security from another subsidiary of Sproutly Canada, Infusion Biosciences Canada Inc. in the form of guarantee and general security agreement in connection with the subsequent advance.[20] The amount outstanding on this loan is $1,190,596.35.[21]

---

[16] Loverock Affidavit at paras. 30 and 37.

[17] Loverock Affidavit at paras. 31-33.

[18] Loverock Affidavit at paras 34-36.

[19] Loverock Affidavit at para 37.

[20] Loverock Affidavit at paras. 38-41.

[21] Loverock Affidavit at para. 42.

20. The DIP Lender and Infusion have entered into a subordination agreement with respect to the security interests of each party.[22]

Her Majesty the Queen in Right of Ontario as Represented by the Minister of Finance

21. The Minister of Finance has registered a PPSA security interest against THR. The Minister of Finance has also registered a lien against the Real Property pursuant to unpaid amounts under the *Employer Health Tax Act,* R.S.O. 1990, c. E. 11, as amended.[23]

22. There was a previous secured lender, Jane Bailey ("**Bailey**") who had an interest in specific gummy production equipment. In April 2022, a purchaser acquired the specific equipment and as part of that transaction the Bailey debt was repaid and the security interest against THR were released.[24]

Other Creditors

23. THR's unsecured obligations total $1.202 million to various creditors. These include:

(a) $355,810.03 for amounts owing for excise taxes associated with the Cannabis License;

(b) $161,694.56 owing pursuant to supply agreements with Albert and New Brunswick;

(c) $16,598.89 in connection to WSIB premiums; and

---

[22] Loverock Affidavit at para. 28.

[23] Loverock Affidavit at paras. 44-45.

[24] Loverock Affidavit at para. 26.

(d) $60,000 in connection with a loan under the *Canada Emergency Business Account* ("**CEBA**") Program.[25]

24. Sproutly, Inc. also owes $60,000 under the same CEBA Program.[26]

The Applicants' Liquidity Crisis

25. Following the COVID-19 pandemic in March 2020, the Applicant's sales declined significantly. As well, some key financing opportunities also came to a halt. As a result of an inability to access liquidity and the downturn in the cannabis market, THR had to cease regular operations at the THR Facility.[27]

26. As the Cash Flow Forecast indicates, the Applicants project estimated disbursements of approximately $748,898 during the Cash Flow Period. The Applicants have a critical and immediate need for interim financing, and without it, the Applicants are unable to meet working capital requirements and to conduct the proposed sales process.[28]

DIP Financing

27. In light of the foregoing, the Applicants have sought a DIP Facility from the DIP Lender.[29] The DIP Facility is required in order for Applicants to meet its ongoing working capital requirements and for it to conduct a sales process.

---

[25] Loverock Affidavit at para. 46.

[26] Loverock Affidavit at para. 47.

[27] Loverock Affidavit at para. 51.

[28] Loverock Affidavit at para. 52.

[29] Loverock Affidavit at para. 53.

28. The Cash Flow Forecast demonstrates that if the relief requested is granted, including the approval of the DIP Term Sheet and the DIP Lender's Charge, the Applicants will have sufficient liquidity to meet its obligations during the initial 10-day Stay Period.[30]

Objectives of CCAA Filing

29. As described above, the Applicants immediately require the protections afforded under the CCAA and the DIP Financing in order to maintain the *status quo* and obtain the breathing room required to run a sales process for the benefit of its stakeholders.

30. On June 6, 2022, THR also received a notice from Toronto Hydro indicating that the power will be disconnected at the THR Facility between June 21, 2022 and July 4, 2022.[31] The urgent granting of a stay provided for under the CCAA is required to prevent this disconnection and to allow the business to be marketed and sold in an orderly process following the comeback hearing.

PART III - THE LAW AND ANALYSIS

31. The issues on this Application are as follows:

(a) whether this Court should grant CCAA protection to the Applicants;

(b) whether this Court should make an Order staying all proceedings in respect of the Applicants;

---

[30] Loverock Affidavit at para. 50.

[31] Loverock Affidavit at para. 58.

(c) whether this Court should approve the Proposed Monitor as Monitor of the Applicants in these CCAA proceedings;

(d) whether this Court should approve the Administration Charge;

(e) whether this Court should approve the DIP Term Sheet (defined below) and the DIP Charge;

(f) whether this Court should approve the Directors' Charge; and

(g) whether the relief sought on this Application is reasonably necessary.

A. This Court should grant protection to the Applicants under the CCAA.

32. The CCAA applies to a "debtor company" whose liabilities exceed $5 million.[32] A "debtor company" is defined, *inter alia*, as a "company" that is "insolvent" or that has committed an act of bankruptcy within the meaning of the *Bankruptcy and Insolvency Act*.[33] A company incorporated by or under an Act of Parliament, or the legislature of a province falls under the definition of "company" in the CCAA.[34]

33. The insolvency of a debtor is assessed at the time of the filing of the CCAA application. While the CCAA does not define "insolvent", the definition of "insolvent person" under the BIA is commonly referenced by the Court in assessing whether an applicant is a debtor company in the context of the CCAA.[35] The BIA defines "insolvent person" as follows:[36]

---

[32] CCAA, s. 3(1).

[33] CCAA, s. 2(1), and s. 3(1); R.S.C. 1985, c. B-3, s. 2 ("**BIA**").

[34] CCAA, s. 2(1).

[35] *Stelco Inc. (Re)*, 2004 CanLII 24933 (ON S.C. [Commercial List]) at paras. 21-22 ("***Stelco***"), leave to appeal refused, 2004 CarswellOnt 2936 (ONCA), leave to appeal to SCC refused, 2004 CarswellOnt 5200.

[36] BIA, s. 2.

> "insolvent person" means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and
>
> (i) who is for any reason unable to meet his obligations as they generally become due,
>
> (ii) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
>
> (iii) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.

34. The tests for "insolvent person" under the BIA are disjunctive. A company satisfying either (i), (ii) or (iii) of the test is considered insolvent for the purposes of the CCAA.[37]

35. In addition to the foregoing tests, in *Stelco*, Justice Farley held that a financially troubled corporation is insolvent if it is reasonably expected to run out of liquidity within a reasonable proximity of time as compared with the time reasonably required to implement a restructuring.[38] In other words, a corporation is insolvent if there is a reasonably foreseeable expectation at the time of filing that there is a looming liquidity crisis that will result in the debtor company not being able to pay its debts as they become due without the benefit of a stay of proceedings. [39]

36. The Applicant entities are all corporations incorporated under the laws of Ontario or Canada. Each Applicant is a "company" within the meaning of the CCAA. The Applicants' liabilities together exceed $5 million.

---

[37] *Stelco,* 2004 CanLII 24933 at para. 28.

[38] *Stelco*, 2004 CanLII 24933 at para. 26.

[39] *Stelco*, 2004 CanLII 24933 at para. 26. The *Stelco* test has been consistently applied in subsequent CCAA proceedings. See *e.g., Target Canada Co.*, 2015 ONSC 303, at paras. 26-27.

37. The Applicants are in a liquidity crisis and are unable to meet their obligations as they generally become due. Accordingly, the Applicants are insolvent and are "debtor companies" to which the CCAA applies.

B. It is appropriate to grant the requested stay of proceedings.

38. Pursuant to section 11.02 of the CCAA, a Court may make an order staying all proceedings in respect of a debtor company for a period of ten (10) days ("**Initial Stay Period**"), provided that the Court is satisfied that circumstances exist that make the order appropriate.[40] Pursuant to section 11.001 of the CCAA, relief granted pursuant to section 11.02 must be only what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.[41]

39. Absent exceptional circumstances, relief granted during an initial CCAA hearing should be limited. [42] Where possible, the *status quo* should be maintained during the Initial Stay Period. [43] During this period, operations can be stabilized and parties can negotiate, which will be followed by a comeback hearing where request for expanded relief can be heard on proper notice to all parties. [44]

40. The relief requested by the Applicants is appropriate, in light of section 11.001 of the CCAA. As described, the Applicants are experiencing a liquidity crisis and are unable to

---

[40] CCAA, s. 11.02.

[41] CCAA, s. 11.001.

[42] *Re Lydian International Limited*, 2019 ONSC 7473 at para. 26 ("***Lydian***").

[43] *Lydian*, 2019 ONSC 7473 at para. 26.

[44] *Lydian*, 2019 ONSC 7473 at para 30.

meet their obligations generally as they become due. Furthermore, the granting of a stay of proceedings is critical to prevent Toronto Hydro from disconnecting power at the THR Facility prior to the comeback hearing, and permit the business to be marked and sold. Therefore, it is appropriate for this Court to grant the requested stay of proceedings in favour of the Applicants.

C. The Proposed Monitor should be appointed as Monitor as requested.

41. Upon the granting of an Initial Order, section 11.7 of the CCAA requires that a trustee be appointed to monitor the debtor company's business and financial affairs. The Proposed Monitor has consented to act as monitor in these CCAA proceedings and is a trustee within the meaning of subsection 2(1) of the BIA.[45] The Proposed Monitor is not subject to any of the restrictions as to who may be appointed as monitor set out in section 11.7(2) of the CCAA.[46]

D. The Administration Charge should be Approved

42. The Applicants request that this Court grant a super-priority Administration Charge on the Property (as defined in the proposed form of the Initial Order) in favour of the Applicants' counsel, the Proposed Monitor, and the Proposed Monitor's independent legal counsel in the amount of $150,000. Section 11.52 of the CCAA provides the Court statutory jurisdiction to grant the Administration Charge:

> 11.52 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in

[45] CCAA, s. 11.7; BIA, s. 2.

[46] CCAA, s. 11.7(2).

> an amount that the court considers appropriate — in respect of the fees and expenses of
>
> (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
>
> (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
>
> (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.
>
> 11.52 (2) Priority – The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.[47]

43. In *Canwest Publishing*, Justice Pepall considered section 11.52 of the CCAA and identified the following non-exhaustive list of factors the Court may consider when granting an administration charge:

(a) the size and complexity of the business 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.[48]

44. The Administration Charge is warranted, necessary, and appropriate in the circumstances, given that:

(a) the proposed restructuring will require the extensive involvement of the professional advisors subject to the Administration Charge;

---

[47] CCAA, s.11.52.

[48] *Canwest Publishing Inc./Publications Canwest Inc., Re*, 2010 ONSC 222 at para. 54.

(b) the professionals subject to the Administration Charge have contributed, and will continue to contribute, to the restructuring of the Applicants;

(c) there is no unwarranted duplication of roles so the professional fees associated with these proceedings will be minimized;

(d) the Administration Charge will rank in priority to the DIP Charge, the Directors' Charge, and any existing security granted by the Applicants in favour of the Secured Creditors, all of whom were provided with notice that the Applicants were commencing this Application for creditor protection pursuant to the CCAA; and

(e) the Proposed Monitor believes that the proposed quantum of the Administration Charge is reasonable.

E. The DIP Facility Agreement and DIP Charge should be Approved

i. *Overview of DIP Facility Agreement*

45. THR requires emergency debtor-in-possession financing to remain in business and implement its restructuring strategy for the benefit of all of the Applicants' stakeholders.

46. As discussed above, THR was able to secure the DIP Facility from the DIP Lender pursuant to a Term Sheet dated June 22, 2022 (the "**DIP Term Sheet**"), wherein the DIP Lender agreed to loan a maximum principal amount of $750,000 to THR, subject to the terms and conditions prescribed therein.[49]

[49] Loverock Affidavit at para. 53.

47. The Applicants' access to the DIP Facility is conditional upon the provision of an order of this Court, among other things, approving the DIP Term Sheet and granting a super-priority charge on the Property in the initial amount of $160,000 subject to the terms of the DIP Term Sheet (the "**DIP Charge**"). [50] The Applicants will seek to increase the DIP Charge under the proposed Amended and Restated Initial Order.

48. The DIP Charge is proposed to rank behind the Administration Charge, but ahead of the Directors' Charge and any existing security granted by the Applicants in favour of the Secured Creditors.

ii. ***Jurisdiction to Approve the DIP Facility Agreement and DIP Charge***

49. Section 11.2 of the CCAA provides the Court with the express statutory authority to approve the DIP Term Sheet and the DIP charge. [51] The Court may also order that a DIP Charge rank in priority over the claim of any secured creditor though it cannot secure a pre-filing obligation. [52]

50. Section 11.2(4) sets out the following factors to be considered by the Court in deciding whether to grant a DIP charge:

(a) the period during which the company is expected to be subject to proceedings under this Act;

---

[50] Loverock Affidavit at para. 65.

[51] CCAA, s. 11.2(1).

[52] CCAA, ss. 11.2(1)- 11.2(2).

(b) how the company's business and financial affairs are to be managed during the proceedings;

(c) whether the company's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

(e) the nature and value of the company's property;

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the monitor's report.[53]

51. DIP Financing can be granted even if it may potentially prejudice some creditors, as long as this is outweighed by the benefit to all stakeholders.[54]

52. Further to recent amendments to the CCAA, where an application for interim financing is made at the same time as an initial application, the court has to also be satisfied that the "terms of the loan are limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period."[55]

53. This provision does not preclude the Court from granting DIP Financing and a DIP Charge during the Initial Stay Period. CCAA Courts have continued to permit parties to seek interim financing at the same time as the initial order.[56]

---

[53] CCAA, s. 11.2(4).

[54] *AbitibiBowater inc. (Arrangement relatif à)*, 2009 QCCS 6453 at para. 16.

[55] CCAA, s. 11.2(5).

[56] See; *Miniso International Hong Kong Limited v. Migu Investments Inc.*, 2019 BCSC 1234, at paras. 73 to 90; *Re Mountain Equipment Co-Operative*, 2020 BCSC 1586, at para. 2.

iii. *The Criteria in Subsections 11.2(1), 11.2(4), and 11.2(5) are Satisfied*

54. Based on following factors, the DIP Facility and the DIP Charge should be approved:

(a) the notice requirements under 11.2(1) have been met;

(b) the Applicants' liquidity as of the week beginning June 26, 2022, is dependent on the DIP Facility;

(c) the DIP Facility is necessary in order for THR to carry out a sales process, which will preserve the value of THR's business for the benefit of all of the Applicants' stakeholders;

(d) the quantum of the DIP Facility is reasonable and appropriate having regard to the Cash Flow Forecast;

(e) the Proposed Monitor is of the view that the DIP Facility and DIP Charge are appropriate and limited to what is reasonably necessary in the circumstances.

55. Without the DIP Facility, the Applicants would be in serious jeopardy and would be unable to meet their working capital needs.

F. The Directors' Charge should be Approved

56. To ensure the ongoing stability of the Applicants' business during the CCAA proceedings, the Applicants require the continued participation of the directors and officers who manage their business and commercial activities. The directors and officers of the Applicants have considerable institutional knowledge and valuable experience.[57]

---

[57] Loverock Affidavit at para. 67.

57. The Applicants request this Court grant a super-priority charge in favour of the Applicants' directors and officers in the amount of $50,000 (the "**Directors' Charge**"). The Directors' Charge protects the directors and officers against obligations and liabilities they may incur as directors and officers of the Applicants after the commencement of the CCAA proceedings, except to the extent that the obligation or liability is incurred as a result of the director's or officer's gross negligence or wilful misconduct. [58] The Directors' Charge will rank behind the Administration Charge and the DIP Lender's Charge.

58. Section 11.51 of the CCAA provides the 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.[59]

59. In approving a similar charge in *Canwest*, Justice Pepall applied section 11.51 of the CCAA and noted the Court must be satisfied with the amount of the charge and that it is limited to obligations the directors and officers may incur after the commencement of the proceedings, so long as adequate insurance cannot be obtained at a reasonable cost.[60]

60. In *Jaguar Mining Inc., Re,* R.S.J. Morawetz (as he then was) stated that, in order to grant a Directors' Charge, the Court must be satisfied of the following factors:[61]

    (a) notice has been given to the secured creditors likely to be affected by the charge;

    (b) the amount is appropriate;

---

[58] Loverock Affidavit at para. 70.

[59] CCAA, s. 11.51.

[60] *Canwest Global Communications Corp., Re*, 2009 CanLII 55114 at para. 46.

[61] *Jaguar Mining Inc., Re*, 2014 ONSC 494 at para. 45.

(c) the applicant could not obtain adequate indemnification insurance for the director at a reasonable cost; and

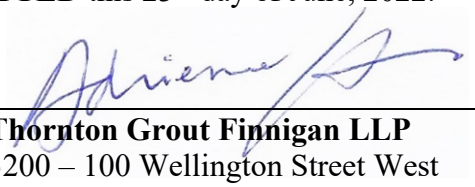
(d) the charge does not apply in respect of any obligation incurred by a director as a result of the director's gross negligence or wilful misconduct.

61. With respect to the Applicants, the Directors' Charge is reasonable in the circumstances because: (i) the Applicants have given notice to the secured creditors likely to be affected by the Directors' Charge; (ii) the Proposed Monitor is of the view that the Directors' Charge is reasonable and appropriate in the circumstances; (iii) there is no directors & insurance officer insurance available given the nature of the cannabis insurance; (iv) the Applicants will require the active and committed involvement of the directors and officers, whose continued participation is necessary for an effective sales process; and (iv) the Directors' Charge does not secure obligations incurred by a director as a result of the directors' gross negligence or wilful misconduct.

PART IV - RELIEF REQUESTED

62. For all of the foregoing reasons, the Applicants request an Order substantially in the form of the draft Initial Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 23rd day of June, 2022.



Thornton Grout Finnigan LLP
3200 – 100 Wellington Street West
TD West Tower, Toronto-Dominion Centre
Toronto, ON M5K 1K7

Rebecca L. Kennedy (LSO# 61146S)
Email: rkennedy@tgf.ca

Leanne M. Williams (LSO# 41877E)
Email: lwilliams@tgf.ca

Adrienne Ho (LSO# 68439N)
Email: aho@tgf.ca

Tel: 416-304-1616
Fax: 416-304-1313

Lawyers for the Applicants

SCHEDULE "A" – LIST OF AUTHORITIES

1. *Stelco Inc. (Re)*, 2004 CanLII 24933 (ON S.C. [Commercial List])
2. *Target Canada Co.*, 2015 ONSC 303
3. *Re Lydian International Limited*, 2019 ONSC 7473
4. *Canwest Publishing Inc./Publications Canwest Inc., Re*, 2010 ONSC 222
5. *AbitibiBowater inc. (Arrangement relatif à)*, 2009 QCCS 6453
6. *Miniso International Hong Kong Limited v. Migu Investments Inc.*, 2019 BCSC 1234
7. *Re Mountain Equipment Co-Operative*, 2020 BCSC 1586
8. *Canwest Global Communications Corp., Re*, 2009 CanLII 55114
9. *Jaguar Mining Inc., Re*, 2014 ONSC 494

SCHEDULE "B" – RELEVANT STATUTES

***Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3**

Section 2

Definitions

insolvent person means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

(i) who is for any reason unable to meet his obligations as they generally become due,

(ii) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or

(iii) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.

***Companies' Creditors Arrangement Act*, R.S.C. 1985, c C-36**

Section 2

Definitions
debtor company means any company that

(a) is bankrupt or insolvent,

(b) has committed an act of bankruptcy within the meaning of the *Bankruptcy and Insolvency Act* or is deemed insolvent within the meaning of the *Winding-up and Restructuring Act*, whether or not proceedings in respect of the company have been taken under either of those Acts,

(c) has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act*, or

(d) is in the course of being wound up under the *Winding-up and Restructuring Act* because the company is insolvent.

Section 3

Application
(1) This Act applies in respect of a debtor company or affiliated debtor companies if the total of claims against the debtor company or affiliated debtor companies, determined in accordance with section 20, is more than $5,000,000 or any other amount that is prescribed.

Section 11

General power of court
Despite anything in the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

Section 11.001

Relief reasonably necessary
An order made under section 11 at the same time as an order made under subsection 11.02(1) or during the period referred to in an order made under that subsection with respect to an initial application shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

Section 11.02

Stays, etc. – initial application

(1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 10 days,

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

[…]

Burden of proof on application
(3) The court shall not make the order unless

> (a) the applicant satisfies the court that circumstances exist that make the order appropriate; and
> (b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

Restriction
(4) Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

Section 11.2

Interim financing
(1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

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

Priority — other orders
(3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

Factors to be considered
(4) In deciding whether to make an order, the court is to consider, among other things,

(a) the period during which the company is expected to be subject to proceedings under this Act;

(b) how the company's business and financial affairs are to be managed during the proceedings;

(c) whether the company's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

(e) the nature and value of the company's property;

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the monitor's report referred to in paragraph 23(1)(b), if any.

Additional factor — initial application
(5) When an application is made under subsection (1) at the same time as an initial application referred to in subsection 11.02(1) or during the period referred to in an order made under that subsection, no order shall be made under subsection (1) unless the court is also satisfied that the terms of the loan are limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

Section 11.51

Security or charge relating to director's indemnification
(1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

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

Restriction — indemnification insurance
(3) The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

Negligence, misconduct or fault
(4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

Section 11.52

Court may order security or charge to cover certain costs
(1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

> (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
>
> (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act. Priority (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Section 11.7

Court to appoint monitor

11.7 (1) When an order is made on the initial application in respect of a debtor company, the court shall at the same time appoint a person to monitor the business and financial affairs of the company. The person so appointed must be a trustee, within the meaning of subsection 2(1) of the *Bankruptcy and Insolvency Act*.

Restrictions on who may be monitor

(2) Except with the permission of the court and on any conditions that the court may impose, no trustee may be appointed as monitor in relation to a company

(a) if the trustee is or, at any time during the two preceding years, was

(i) a director, an officer or an employee of the company,

(ii) related to the company or to any director or officer of the company, or

(iii) the auditor, accountant or legal counsel, or a partner or an employee of the auditor, accountant or legal counsel, of the company; or

(b) if the trustee is

(i) the trustee under a trust indenture issued by the company or any person related to the company, or the holder of a power of attorney under an act constituting a hypothec within the meaning of the *Civil Code of Quebec* that is granted by the company or any person related to the company, or

(ii) related to the trustee, or the holder of a power of attorney, referred to in subparagraph (i).

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 SPROUTLY, INC. and TORONTO HERBAL REMEDIES INC. (each an "**Applicant**" and collectively, the "**Applicants**")

Court File No. CV-22-00683056-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings commenced at Toronto, Ontario

FACTUM OF THE APPLICANTS

Thornton Grout Finnigan LLP
3200 – 100 Wellington Street West
TD West Tower, Toronto-Dominion Centre
Toronto, ON M5K 1K7

Rebecca L. Kennedy (LSO# 61146S)
Email: rkennedy@tgf.ca

Leanne M. Williams (LSO# 41877E)
Email: lwilliams@tgf.ca

Adrienne Ho (LSO# 68439N)
Email: aho@tgf.ca

Tel: 416-304-1616
Fax: 416-304-1313

Lawyers for the Applicants